Jan 26 1872
Curtis - 2-Pet - 6.
Parsons Lord et l-

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~291.~~ 93

PAUL SEARS, REUBEN HOPKINS, ET AL., LIBELANTS, APPELLANTS,

vs.

THE BRITISH STEAMER "SCOTIA," HER TACKLE, ETC., THE BRITISH AND NORTH AMERICAN ROYAL MAIL STEAM PACKET COMPANY, CLAIMANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 16, 1870.

March 2 1872
Jno Adams Clerk

SUPREME COURT OF THE UNITED STATES.

No. 291.

PAUL SEARS, REUBEN HOPKINS, ET AL., LIBELANTS, APPELLANTS,

vs.

THE BRITISH STEAMER "SCOTIA," HER TACKLE, ETC., THE BRITISH AND NORTH AMERICAN ROYAL MAIL STEAM PACKET COMPANY, CLAIMANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Clerk's certificate	a	1
Libel	1	1
Answer	2	2
Stipulation for libelants' costs	4	5
Claim of agent of owners	4	6
Consent to waive execution of process	5	7
Order to waive service of process	6	7
Stipulation	6	8
Stipulation	7	8
Hearing of cause in district court	7	9
Deposition of Benjamin F. Berry	8	10
Deposition of James Mills	11	14
Diagram	12	15
Deposition of Thomas Burgess	15	19
Diagram	15	20
Testimony of Henri Von Wyngard	17	22
Diagram	18	24
Deposition of John J. Sowerby	20	26
Diagram	21	28
Deposition of Hamlyn Chippendall	23	30
Deposition of Charles H. E. Judkins	25	33
Testimony of John C. Nelson	26	35
Andrew Heron	28	37
David Griffiths	30	39
Daniel Taylor	31	41
Daniel Hyndman	32	41
John J. Cassidy	33	43

plainly seen by those on board the steamer. That, thereupon, they hailed her and warned her off, and did everything in their power to avoid and prevent a collision. That the mariners on board the steamer paid no heed to the warnings, but came on at full speed, and struck the ship of your libellants about opposite the fore chains, with the blow glancing a little forward, cutting her bow off, and carrying away her fore-mast with all her fore-rigging.

Fourth. That the said collision was brought about entirely by the carelessness and mismanagement of the master and mariners on board the said steamer, and not through any want of care on the part of the mariners on board the Berkshire. That it was the duty of said steamship to have kept out of the way of the ship of your libellants; that she had ample time and space in which to have avoided the ship of your libellants, but that she put her helm to port, knowing that the ship of your libellants had the wind free, and attempted to cross the bows of the Berkshire, and followed her up until the collision took place, as above set forth. That by such collision, the ship of your libellants was sunk and had to be and was abandoned by her master and mariners, and, together with her cargo, became a total loss. That the said ship and her pending freight were of the value of the sum of fifty-five thousand dollars, and the cargo was of the value of $340,000, making the total damages sustained by the libellants the sum of three hundred and ninety-five thousand dollars, which sum, with interest, your libellants claim to recover from the said steamer for the wrongful acts of her master and mariners, as above set forth.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court, and that the said steamer which ran into and sunk the ship of your libellants, was the steamer Scotia, and that she is now lying in the port of New York.

Wherefore, your libellants pray that process in due form of law may issue against the said Steamer Scotia, her tackle, apparel, engine, and furniture, and that all persons having any interest therein may be cited to appear and answer all and singular the allegations aforesaid, and that this honorable court will be pleased to decree in favor of the libellants in the sum of three hundred and ninety-five thousand dollars, with their interest and costs, and that said steamer may be con-
2 demned and sold to pay the same, and that your libellants may have such other and further judgment, order, or decree, as may be just and equitable.

PAUL SEARS.

Sworn to before me, this 23d day of April, 1867.
[NOTARIAL SEAL.] GEORGE A. BLACK,
Notary Public, N. Y. Co.

SCUDDER & CARTER, *Lib'ts' Proc's.*

(Endorsed:) 21, 38. United States district court, southern district of New York. Paul Sears and others against The Steamship "Scotia," her tackle, &c. Libel. Scudder & Carter, proctors for libell'ts. Filed April 26, 1867.

To the Honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The answer of the British and North American Royal Mail Steam Packet Company to the libel of Paul Sears, Reuben Hopkins, and Re-

becca F. Smith, executrix, owners of the ship Berkshire, against The Steamer Scotia, her tackle, &c., respectfully shows:

First. That these respondents have no knowledge that the libellants were owners of the Berkshire at the time of the collision in said libel mentioned, or as to the description or value of her cargo at that time. They deny, on information and belief, that she was then tight or staunch, or well manned or supplied; but they admit that she was then prosecuting a voyage from New Orleans to Havre.

Second. They admit that, on the 11th day of April last, the mariners of the Berkshire discovered the lights of the Scotia on their port bow, and at a considerable distance, which may have been four or five miles or more, but these respondents have no exact information as to such distance; and at this time the Berkshire had the wind free, and was steering as nearly as practicable to her course, which was very much to the south of east. And the respondents say, on information and belief, that her actual course, when the Scotia's lights first became visible from her deck, was more southerly than is alleged in the libel; that she was under full sail, and making at least seven miles an hour.

Third. These respondents, on information which they believe to be true, deny that the mariners of the Berkshire found that the Scotia's light was coming directly towards them, or that they were unable to make out any other than a white light, or that there was any reason for supposing that the Scotia was a sailing vessel, or that a collision would happen if the two vessels kept their course, but they admit that the master of the Berkshire ordered her helm put astarboard, and that, upon this being done, the Scotia's lights were brought over her starboard bow, and that a collision as hereinafter described occurred very shortly afterwards. The respondents deny that at the time of the collision the Berkshire had any other than a bright light, which was fastened to her anchor stock, which was in violation of the laws both of England and America. Respondents admit, however, that said light was seen from the steamer before the collision, and that they have no knowledge that the mariners of the Berkshire hailed the Scotia, or took any means to avoid the accident. They deny that the Scotia ran against the Berkshire at full speed, but they admit that she came obliquely against her, first touching her a little forward of the fore chains, but they are not informed what damage was caused thereby to her spars or fore rigging.

Fourth. The respondents deny that said collision was in any measure attributable to the carelessness or mismanagement of the master or mariners of the Scotia, or that they attempted to cross the bow of the Berkshire, or that they had any reason to know or suppose that said ship had the wind free. The respondents admit that the Berkshire was abandoned by the master and mariners, but they have no knowledge or information as to what afterwards became of her, nor of what was the value of the ship or her cargo.

They admit that the Scotia was, at the commencement of this action, moored to the wharf at Jersey City, and within the jurisdiction of this honorable court; but they deny each and every allegation of said libel which they have not admitted or otherwise answered specifically.

3 Fifth. The respondents further allege that, on the night mentioned in the libel, the steamer was in prosecution of one of her regular trips from Liverpool to New York; that she was fully manned and equipped, having two men stationed on the forecastle and two others on the paddle-boxes, as lookouts, and an officer on the forward deck.

The officer having command of the watch was on the bridge; another officer was stationed at the wheel-house, a full watch of engineers in the engine-room, and several men stationed in different parts of the ship to transmit orders. She had also a large bright light fastened at her masthead, a green light on her starboard side, and a red light on her port side, all properly screened from shining on board, and burning brightly, so as to be visible, on the night in question, at a distance of at least five miles.

Sixth. Respondents further allege that, as the Scotia was steering west by north half north, making about thirteen knots in an hour, the lookout discovered and at once reported a bright light on the port bow; that said light then appeared to be about five miles off; that the steamer's helm was at once ported, and the light kept receding gradually from the Scotia's bow, until, very shortly before the collision, it began to close in; that thereupon the Scotia's engines were stopped and reversed, and her headway stopped—every effort resorted to to avoid the disaster; that, although it was impossible to avoid a collision, the blow was very slight, and would not have caused any serious damage to a sound vessel; and the damage sustained by the Berkshire was owing, as respondents are informed and believe, to her unseaworthy condition rather than to the force with which the Scotia ran against her.

Seventh. The respondents further allege that, when the two vessels first became visible from each other, their courses were divergent, the Scotia's course being north of west, and the Berkshire's considerably south of east; that each bore off the port bow of the other, and that, if the Berkshire had kept her course, no collision would have happened, even if the Scotia had not ported; that the red and white lights of the Scotia were distinctly visible from the Berkshire, and were noticed by her crew and the mate, who was then officer of the deck; that said mate thereupon ordered her helm aport, which was done, and the ship came around towards the south so as to be at times in the wind; that, after having kept her course for some time, the master came on deck and imprudently countermanded the mate's order, and had the ship's helm put hard astarboard, ordering extra men to the wheel to assist in the manœuvre, and thereupon the ship suddenly changed her course to northward, falling off rapidly before the wind, and getting before the course of the steamer; that the Berkshire had not the red and green lights required by the laws and customs both of England and of the United States, so that it was impossible for those in the Scotia to discover the changes in her course; and they say that the collision was caused entirely by the want of proper lights, and the mismanagement and want of care on the part of those in charge of the Berkshire. And the respondents pray that the libel may be dismissed with costs, and that said steamer Scotia may be restored to them, in conformity with their claim heretofore filed herein.

D. D. LORD,
Proctor for Claimants.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

JOHN J. SOWERBY, being duly sworn, saith that he is chief officer of the steamship Scotia, and was in charge of said steamship, as officer of the deck, at the time of the collision mentioned in the libel; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters

therein stated on information and belief, and as to those matters he believes the same to be true.

JNO. J. SOWERBY.

Sworn to before me this 3d day of June, 1867.
[NOTARIAL SEAL.] PATRICK HOGAN,
Notary Public.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

CHARLES G. FRANCKLYN, being duly sworn, saith that he is agent of the British and North American Royal Mail Steam Packet Company in the city of New York; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes the same to be true.

CHA'S G. FRANCKLYN.

Sworn to before me this 13th day of June, 1867.
[NOTARIAL SEAL.] PATRICK HOGAN,
Notary Public.

4 (Endorsed:) 21, 38. U. S. district court, south'n dist. of N. Y. The St'ship Scotia, &c., ads. Paul Sears et al. Answer. D. D. Lord, for claim'ts.
Filed June 13th, 1867.

District court of the United States for the southern district of New York.

Stipulations for libellants' costs, entered into pursuant to the rules and practice of this court.—Filed the 26th day of April, 1867.

Whereas a libel was filed in this court on the twenty-sixth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, by Paul Sears and others, against The British Steamer "Scotia," her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steamer, &c., may be condemned and sold to pay the demands of libellants, and the said libellants and James C. Carter and Jacob R. Telfair, sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their sureties, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

PAUL SEARS AND OTHERS,
By JAMES C. CARTER.
JAMES C. CARTER.
JACOB R. TELFAIR.

Taken and acknowledged this 26th day of April, 1867, before me.
GEO. F. BETTS,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

JAMES C. CARTER and JACOB R. TELFAIR, parties to the above stipulation, being duly sworn, doth each depose and say that he resides in the city of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAMES C. CARTER.
JACOB R. TELFAIR.

Sworn to this 26th day of April, 1867, before me.

GEO. F. BETTS,
U. S. Commissioner.

Recorded the 26th day of April, 1867.

GEO. F. BETTS, *Clerk.*

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Saturday, the twenty-seventh day of April, in the year of Lord one thousand eight hundred and sixty-seven:

Present, the Honorable Samuel R. Betts, district judge.

THE BRITISH STEAMER "SCOTIA," HER ENGINES, TACKLE, &c., *asm.*
PAUL SEARS AND OTHERS, OWNERS OF THE late ship "Berkshire." } 21, 38.

And now Charles G. Francklyn, intervening as agent for the interest of the British and North American Royal Mail Steam Packet Company in the said steamer, appears before the honorable court and makes claim to the said steamer, &c., as the same are attached by the marshal, under process of this court, at the instance of Paul Sears and others; and the said Charles G. Francklyn avers that said company was in possession of the said steamer, &c., at the time of the attachment thereof, and that the company above named is the true and bona fide owner of the said steamer, &c., and that no other person is the owner thereof, and the said Francklyn is the true and lawful baillee thereof, as agent; wherefore he prays to defend accordingly.

D. D. LORD,
Proctor for Claimants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

CHARLES G. FRANCKLYN, being duly sworn, deposes and says that he resides in the city of New York; that he is the agent of the above-named claimants; that the owners of said Scotia reside in England and Scotland, and that this deponent is duly authorized to put in this claim in behalf of the owners of the said steamer Scotia, and that the said claim is true of the knowledge of this deponent, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

CHARLES G. FRANCKLYN.

Sworn to and subscribed this 27th day of April, A. D. 1867, before me.

GEORGE DE FOREST LORD,
Notary Public, City of New York.

(Endorsed:) Vol. 21, No. 38. United States district court, for the southern district of New York. The Br. Steamer Scotia, her engines, tackle, &c., asm. Paul Sears and others, owners of the late ship Berkshire. D. D. Lord, proctor for claimants. Claim of agent for owners. Filed the 29th day of April, 1867.

United States district court, southern district of New York.

PAUL SEARS ET ALS.
vs.
THE STEAMSHIP SCOTIA, HER TACKLE, &C.

It is hereby stipulated and agreed that the value of the steamship Scotia be taken for the purpose of giving the usual stipulations, at the sum of four hundred thousand dollars, and that the execution of the process of arrest issued herein against the said steamship be waived, upon the execution by the claimants of a stipulation, in the usual form, to abide the decree, &c., in the sum of two hundred thousand dollars, with two sureties, each surety to justify in that sum.

Dated New York, April 27th, 1867.

SCUDDER & CARTER,
Proctors for Libellants.
D. D. LORD,
Proc. Claimants.

(Endorsed:) 21, 38. U. S. district court. Paul Sears, et al., ag'st The Steamship Scotia, &c. Consent to waive execution of process, &c. Scudder & Carter, proctors for libellants. Filed April 27th, 1867.

6 At a stated term of the district court of the United States of America, for the southern district of New York, held at the United States court-rooms, in the city of New York, on Monday, the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and sixty-seven:

Present, the Honorable Samuel R. Betts, district judge.

THE BRITISH STEAMSHIP SCOTIA, &C.,
ads.
PAUL SEARS ET AL.
21, 38.

On reading and filing consent to waive service of process of attachment and stipulation, and the terms being complied with by the claimants filing claim and executing stipulations for costs and value, the latter in the sum of four hundred thousand dollars, approved by the libellants' proctors:

Now, on motion of D. D. Lord, proctor for the claimants, it is ordered, that service of process of attachment be, and the same hereby is, waived, the stipulation for value to represent said steamship in the above-entitled action, and that the claimants' appearance be entered herein.

(Endorsed:) Vol. 21, No. 38. United States district court for the southern district of New York. The British Steamship Scotia, &c., ads. Paul Sears et als. Order to waive service of process and enter claimants' appearance. D. D. Lord, proctor for claimants. Filed the twenty-ninth day of April, 1867.

District court of the United States for the southern district of New York.

Stipulation entered into pursuant to the rules and practice of this court.—Filed the 27th day of April, 1867.

Whereas a libel was filed in this court on the 26th day of April, in the year of our Lord one thousand eight hundred and sixty-seven, by Paul Sears and others, owners of late ship "Berkshire," against The British Steamer "Scotia," her engines, tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steamer may be condemned and sold to pay the demands of said libellants, and the parties hereto hereby consenting that in case of default or contumacy on the part of the claimants or their sureties, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands; and whereas, also, a claim has been filed in said cause by the British and North American Royal Mail Steam Packet Company:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollsrs, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or, upon an appeal, by the appellate court.

CHARLES G. FRANCKLYN.
ROYAL PHELPS.
JOHN R. GARDNER.

Taken and acknowledged this 27th day of April, 1867, before me.

JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

ROYAL PHELPS and JOHN R. GARDNER, parties to the above stipulation, being duly sworn, doth each depose and say, that he resides in the southern district of New York; that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

ROYAL PHELPS,
JOHN R. GARDNER.

Sworn to this 27th day of April, 1867, before me.

U. S. Commissioner.

Recorded the 27th day of April, 1867.

Clerk.

7 District court of the United States for the southern district of New York.—In admiralty.

Stipulation entered into pursuant to the rules and practice of this court.—Filed the 27th day of April, 1867.

Whereas a libel was filed on the 26th day of April, in the year of our Lord one thousand eight hundred and sixty-seven, by Paul Sears and others, owners of the late ship "Berkshire," against the British Steamer

"Scotia," her engines, tackle, &c., for the reasons and causes in the said libel mentioned; and whereas the parties in interest have consented that service of process of attachment be waived, on the claimants filing claim and executing stipulations for costs and value, the latter in the sum of four hundred thousand dollars, ($400,000 00,) in lieu of the said steamship being in the custody of the marshal, under the process about to be issued in pursuance of the prayer of said libel, as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of the claimants or their sureties, execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree, to D. D. Lord, esq., proctor for the claimants of said Steamer "Scotia," &c., abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

British & N. A. R. M. Steamship Co.,
By CHARLES G. FRANKLYN, *Agent.*
ROYAL PHELPS.
JOHN R. GARDNER.

Taken and acknowledged this 27th day of April, 1867, before me.
JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

ROYAL PHELPS and JOHN R. GARDNER, parties to the above stipulation, being duly sworn, each deposes and says that he resides in the southern district of New York, and that he is worth the sum of four hundred thousand dollars over and above all his just debts and liabilities.

Sworn to this 27th day of April, 1867, before me.

U. S. Commissioner.

Recorded this 27th day of April, 1867.
We approve of the foregoing stipulation as to form and sufficiency.
SCUDDER & CARTER.

APRIL 29TH, 1867.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the 27th day of October, in the year of our Lord one thousand eight hundred and sixty-eight:
Present, the Honorable Samuel Blatchford, district judge.

PAUL SEARS ET AL.
vs.
THE BRITISH STEAMSHIP SCOTIA, HER ENGINES, &C. } 21, 38.

This cause being called in its order on the day calendar, ordered hearing. Pleadings read.

8 Evidence for libellants:

Deposition of Benj. F. Berry.....read.
" " James Mills..... "
" " Thomas Burgess..... "
" " Henry Von Wingaard..... "

Evidence for claimants:

Deposition of John J. Sowerby..... "
" " Henry Chippendale..... "
" " Capt. Judkins..... "

Cause adjourned to 11 A. M., to-morrow.

October 28th.—Cause continued.

Evidence for claimants:

Deposition of John C. Nelson.....read.
" " Andrew Heron..... "
" " David Griffiths..... "
" " Daniel Taylor..... "
" " Daniel Hyndman..... "
" " John J. Cassidy..... "
" " William Curll..... "
" " John O'Neil..... "
" " William Breen..... "
" " Thomas Cunningham..... "
" " Thomas Reilly..... "
" " James Wilson..... "
" " Martin Nelson..... "
" " William M. Simpson..... "
" " Levi Dinsmore..... "
" " Gustav Anderson..... "
" " Charles Dunning..... "

Cause adjourned to Saturday, Nov. 21, prox., for argument.

Nov. 21.—Cause continued.

Mr. James C. Carter argues for libellants.
Mr. Daniel D. Lord do. do. claimants.
Case adjourned to Monday next at 3 p. m.

Nov. 23d.—Cause continued.

Mr. Lord puts in, on behalf of claimants, the merchants' shipping law of England.

Mr. E. C. Benedict argues for claimants.
Mr. Donohue argues for libellants.
Briefs and points to be handed in.—C. A. V.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on the sixth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the

more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at No. 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Benjamin F. Berry, to testify and the truth to say, on the part and behalf of the libellants, in a certain suit or matter of controversy, now depending and undetermined in the district court of the United States, for the southern district of New York, at New York, wherein Paul Sears and others are libellants against The Steamship Scotia, her tackle, &c.

9

And the said Benjamin F. Berry, being about the age of thirty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Benjamin F. Perry, and he did thereupon depose, testify, and say as follows, viz:

I reside in Brewster, Massachusetts; am a seafaring man. I expect to sail for London in two or three days. I have followed the water since I was sixteen; have been master since June, 1861. I know the ship Berkshire; was master of her on the voyage on which she was sunk, from New Orleans to Havre. She left New Orleans March 6th, 1867, loaded with cotton—2,220 bales and upwards—no other cargo. James Mills was chief officer; Thomas Burgess was second officer. I recollect the collision with the steamship Scotia, in lat. N. 49°, lon. 29° W., on the morning of April 11th, 1867, at about quarter past two, a. m. It was the chief officer's watch on deck at the time; my watch below. I had turned in about 10 that night. Prior to the collision, and while I was below, I heard a report, "Light, ho," from the forward part of our ship, from the deck.

(Objected to.)

On that, I got out immediately. While I was putting on my pants, I heard the mate rap on my window.

Q. What instructions, if any, had you given about being called?

(Objected to.)

A. I had always given orders to my officers, on leaving port, to call me in case of vessels coming anywhere near, or seeing lights, or in case of squalls or too much sail on the ship, or whenever it is necessary for a master to be on deck. After hearing this report of a light, I went out on deck; my cabin is on deck. I presume I got on deck within a minute after the light was reported. After I got on deck, I did not see a light immediately. I went to the weather side—the starboard side—and looked over, and did not see a light. I said to the officer, "Where is it?" His answer was, "About a point off our lee bow." I went to the leeward, and looked over the rail, and I saw the light off our lee bow, about a point, I should judge. I looked at it for some time, and the mate came down off the poop and stood beside me. After watching it some little time, and noticing that it was closing in, I told the mate it must be a sailing vessel standing to the westward. I said we can't fetch across his bow; we had better keep off while we have got plenty of time. I gave the order to heave the wheel up, that is, to put it astarboard, and to keep her off. I told him we could show him our green light, to let him know what we were doing, and I went into the cabin after it;

brought it out, and told the mate to take it while I went after my glass. I came out with my glass, steadied the ship, looked at the light ahead, and just as I looked at it, I caught sight of another light, which I can't swear whether it was green or not, but it was not red. I only saw it for an instant; did not notice whether it was higher up or lower down than the light which I had first seen. At this time the mate had hold of the green light, which I had brought out from the cabin. At the time I saw the second light of the other vessel, she was nearly abeam on the starboard side.

Q. How was the mate holding the light?

A. He had it placed on top of the rail, on the starboard side. I held it for a moment, after I brought it out from the cabin on the rail, on the starboard side, between the main and mizzen rigging, before I gave it to the mate, and the mate held it in the same place. When I came out from the cabin with it, the lights of the other vessel bore just off our starboard bow; our ship was just swinging off.

Q. When you first came out of the cabin, and made the light off your port bow, how long was that before the collision?

A. As near as I can judge, fifteen or twenty minutes.

Q. How long did you stand looking at the light over the rail trying to make it out?

A. I should think, five or six minutes.

Q. When you first made the light, fifteen or twenty minutes before the collision, how far off from you was it, in your judgment?

A. Six or seven miles, I should think. I couldn't make out what kind or color of a light it was. I came to the conclusion that it was a green one.

Q. How is it about distinguishing the colors of lights at sea at a great distance?

A. It is hard work to tell the difference between a bright light and some green lights, some distance off. You can distinguish red lights easy.

Q. How long did the mate continue to hold the green light on the rail?

A. I don't know, but some time. When I first came on deck, our sails were checked in; our course was S. E. by E. ½ E., by compass. Our true course there, as we were heading, was about E. The variation of the compass causes that difference. That is the usual variation in that latitude and longitude. We were heading for the mouth of the English Channel. When I came on deck, the main top-gallant sail was lifting; that indicated that she was too near the wind. That sail ought to have been kept full. She was to windward of her course. No order had been given to luff, that I had heard. The wind was then about S. S. W., blowing a five or six knot breeze. We had the wind two points free. We calculate a ship will head within six points of the wind. If the wind is anything further aft than that, we call it free: two points free when it is abeam.

Q. State what happened after you saw the lights of the other vessel on your starboard beam?

A. I saw the red light of the other vessel almost immediately after the other one shut in. Then I said to the mate, "By God, it is a steamer." That is the expression I made use of. I immediately gave the order, "Hard up, again," and went on to the poop by the helm, and commenced shouting, "Steamer, ahoy." Then I could see the steamer's hull, and that it was pointing right for the ship. The steamer gradually wound off and struck us right by the fore-rigging. I hailed

him when, alongside; asked him to lay by me; but never got any answer from him. He started off ahead, cleared himself of the ship. I gave the order to sound the pumps to, the carpenter. He reported there was two feet of water in her. I gave orders to turn the boats up, and went forward. Found the bow stove in. Came aft, and sounded the pumps myself; found there was two fathoms of water in her; told the mate we should have to leave the ship. I saw the steamer starting off, as I supposed. Then she came back under my stern, and hailed me; asked me if I wanted any assistance. I told him to send his boats, I was sinking. He sent three boats; told us to get in as quick as we could; said they wouldn't take any of our clothing. I asked him to take my wife's trunk, which was in one of my boats. They did so; told me to get in as quick as I could—after all the crew got in—and we left her. We went on board the Scotia. I asked the captain to lie by till daylight. He said, "No, no;" and brought us in to New York. When the Scotia wound off before the collision, it was more towards me, and not more away from me. She struck us right by our fore-topmast backstays, that is, two feet aft of the after shroud of the fore-rigging. I can't tell just how much of a break she made there. She ripped up our decks, stove our side in, so that I could see the cotton. The blow was angling, towards forwards. The blow was strong; knocked me from one side of the deck to the other. I should think the speed of the steamer was somewhere from 12 to 14 knots; as she came down upon us. She did not back nor stop before the blow. I know that, because I saw the water coming off aft her paddles till she struck us. No other part of the steamer hit us but her bows when she first struck. The blow threw my quarter against her sponson, and smashed in my quarter. That blow, when my quarter went against her sponson, was strong enough to knock away all my steering apparatus. The Berkshire was just as good a ship as I ever was aboard of, as to soundness and strength. I had sailed her one year and eleventh months; had made one voyage in her around Cape Horn, with a full cargo of coal; then back again, with a full cargo of guano to Dunkirk, France—1,100 tons. Also brought a load of salt from Cadiz to Boston. Off Cape Horn we met pretty severe weather. She stood it perfectly well; made no water to speak of. On this voyage she had made no water to speak of before the collision; no more than usual. I never was aboard a ship that didn't make some. Her measurement was 627 tons, old, and 776 tons, new. The ship had good rigging—wire; spars were good, except a slight defect in her cross-jack yard.

Cross-examined by D. D. Lord, esq.:

I am going in the Western Empire, belonging to New York; agent, Cha's L. Colby. Uncertain how long I am to be gone. Mr. Sears does not own any share in her, nor any other owner of the Berkshire.

BENJAMIN F. BERRY.

Sworn to before me this 6th day of November, 1867.

GEO. F. BETTS,
U. S. Comm'r.

(Endorsed:) 21, 328. U. S. district court. Paul Sears and others, libellants, vs. The Steamship Scotia, her tackle, &c. Deposition. Benjamin F. Berry, master of "Berkshire," for libellants.

11 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this sixth day of June, in the year of our

Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812; and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, to testify and the truth to say, on the part and behalf of the libellants in a certain suit or matter of controversy, now depending and undetermined, in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants, against The Steamship Scotia, her tackle, &c.

And the said James Mills, being about the age of thirty-five years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said James Mills, and he did thereupon depose, testify, and say as follows, viz.:

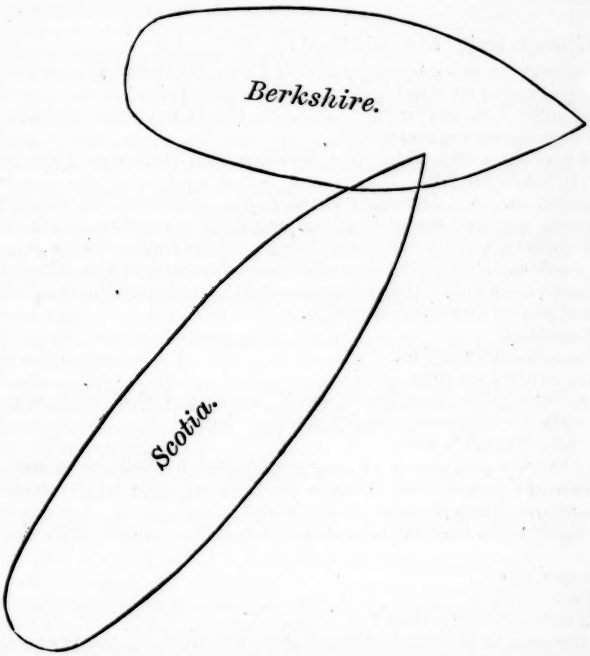
I reside in Boston, Mass. Am a seafaring man. I came on to New York to be examined in this case. I was chief mate of the Berkshire at the time of the collision. She was from New Orleans, bound to Havre, with a cargo of cotton—2,245 bales. It was my watch on deck, the time the light of the Scotia was first seen. At that time it was my watch from 12 midnight to 4 a. m. The bright light was the first thing we saw; I mean a plain white light—not colored. In my judgment, she was five or six miles off when I first saw the light. At that time I did not know whether she was a steamer or sailing vessel, but I supposed she was a sailing vessel. The wind was about S. S. W. We were steering S. E. by E. ½ E.; that was our due course by the compass, when we first saw the light. I sung out to keep her luff, and then I ran aft and tapped on the captain's window, and he came running out on deck. When I first saw this light, I should say it bore a point and a half on our port bow. We thought the vessel approaching was on the other tack, standing to the westward—close hauled on a wind.

(Objected to.)

As the vessels approached, that light did not seem to open any, only to draw nigher. That was the reason that we kept away, thinking that she was on the other tack, standing to the westward. When we kept away, I suppose that light was three miles away. By keeping away, I mean putting our helm up and keeping before the wind. At the time we put our helm up, I had not seen any light on the approaching vessel except a bright light. I had not then heard anything on or from the approaching vessel to show that she was a steamer. We brought the other vessel abeam off our starboard side, and then I saw her red light for the first time. We kept away till we got her off our starboard quarter, then the captain sung out to steady, that we were all clear. Then he made out she was a steamer, by seeing her paddle-boxes and hearing her paddles, and then he sung out again to keep her away. Previous to this, when we brought her off our starboard side—can't exactly say whether beam or quarter—the captain ran into the cabin and brought out the green light, and held it over the starboard side. That

was before we knew what she was—before we made her out to be a steamer. I suppose she was about three-quarters of a mile off when our green light was shown. Captain held it over the side about five or six minutes, then he gave it to me to hold while he went in to get the spy-glass to make out what she was. This was before I knew she was a steamer. He went into the cabin for a spy-glass. He brought out the glass and tried, but could'nt make out what she was, and handed it to me. I took it and tried, but I could'nt make out what she was. He brought out the glass about the time we first kept away. I hailed them till I was hoarse for a fortnight afterwards. I sung out, "Steamboat, ahoy!" I got no answer. There was no hail from the steamer before the vessel struck.

12



This is the way we came together. The Scotia struck us abaft the fore rigging. The blow made the cotton appear most down to the water line; she began to leak. It carried away the fore rigging. The steamer did not stop her paddles till after she struck us. I should say she was going full speed. I don't know how fast she does go.

Q. Did any person, and if so, who, upon the Scotia, make any statement to you in regard to her speed at the time of the collision.

(Objected to.)

A. Yes; one of the third officers, I think, told me she was going twelve knots.

(Ruled out. Exception.)

The shock of the collision at the time carried away our main-top-gal-

lant mast, and shortly after the foremast went over the side. I can't say how far she cut into our deck, for I didn't go forward. When we first discovered the light, we had a bright light on our ship on the anchor stock. I suppose it was 9 or 10 feet above the main deck It was so situated that it could be seen ahead. Before the Scotia struck us I could see her slueing around—kind of following us. If the Scotia had stopped her paddles, I think there would not have been any collision—that she would have gone clear.

Q. If she had not ported her helm and followed you as you have stated, would she have gone clear of you?

A. She would have gone clear of us. After the collision, and when the Scotia was alongside us, we hailed her, and could not get any reply.

Adjourned to June 7th, 10 a. m

JUNE 7TH.

Cross-examined by Mr. Lord:

I have been to sea 20 years; officer 12 to 13 years. It is about 5 years since I first acted as chief officer. I have been most of my time trading between here and Liverpool. I know the lights that sailing vessels ought to carry by regulation.

Q. When does the regulation require a sailing vessel to carry the bright (or white) light?

(Objected to. Mr. Donohue stating, as one ground of objection, that the witness has not stated that the regulation requires a bright light, and the form of the question assuming that he has so stated.)

A. I have been carrying a bright light forward in the different ships that I have been in, in the Atlantic—that is, clear of the coast altogether—when not in the track of ships.

Q. Repeated.

A. Same answer again.

(Read, subject to objection.)

Q. Do you know whether there is any regulation by statute as to where sailing vessels shall carry a bright light?

A. I don't know.

13 Q. Do you know of any regulation by statute, either of this country or of Great Britain, prescribing what lights shall be carried by sailing vessels when under way?

A. Where? On the coast, or in the English Channel, or in the Atlantic?

Q. Anywhere?

A. Yes.

Q. What lights are they?

A. Green light on the starboard side, red light on the port side; that is, on the coast, or in the English Channel, or in the track of ships.

Q. How long was it after the steamer's light was first reported that you gave the order to the man at the wheel to keep his luff?

A. As soon as I went forward and made the light out myself—might say one minute.

Q. What did the man do at the wheel in execution of that order?

A. Kept his luff, according to my orders. He put his helm to port.

Q. How long after the helm was ported before the captain gave the order to put it to starboard, or to keep away?

A. I suppose ten to fifteen minutes.

Q. After the helm was put aport, how close did you come up into the wind?

A. Three-quarters of a point.

Q. Did you come so close that your sails shook?

A. Once, and then the captain told him to keep full, so as to have the ship under command. When our sails shook we were heading about S. E. ¾ E.

Q. How long after the sails shook, and you kept her full, was it that the captain gave the order to bear away?

A. From three to five minutes.

Q. Did the captain go for the lantern before or after he gave the order to bear away?

A. Much about the same time. He gave orders to bear away, and brought the steamer's light on our starboard side, and then went into the cabin and brought out the green lantern, showing the green light at about three-quarters of a mile from the light that we saw, and which we did not then know whether it was a steamer's light or sailing vessel's light.

Q. What sort of a lantern was this?

A. The same as all the side lights of other ships.

Q. How long did it take the captain to go into the cabin and bring out that light?

A. Two or three seconds.

Q. How long after the lantern was brought on deck before he returned to the cabin for his spy-glass?

A. About four or five minutes.

Q. During all this time did he stand holding the lantern over the starboard side?

A. Yes.

Q. Did you see what lamp was in that lantern?

A. I did not.

Q. What did you do with the lantern when the captain returned on deck with the spy-glass?

A. I took the light out of the captain's hand for him to go into the cabin for his spy-glass. I held the lamp there till the steamer got so close that I got scared, and dropped the light and ran to the gangway, hailing, "Steamboat ahoy!"

Q. How was the glass in front of that lantern; was it plain or ribbed?

A. Plain; that is, smooth.

Q. Where did you stand while you were holding the lantern over the side?

A. Forward of the mizzen rigging, on the starboard side.

Q. While on board the Scotia did you not say to a gentleman named Bell that, if the helm had been kept aport, the collision would not have happened?

A. No; I did not. I don't know the man's name, nor anybody's else name on board the Scotia, except the captain's.

Q. Did you not tell somebody on the Scotia that, if your helm had been kept aport, or that if you had kept your luff, or that if you had not borne away, the collision would not have happened, or what was substantially like this?

(Objected to.)

A. I did not.

Q. Did you not tell somebody on board the Scotia that the collision was owing to mismanagement on the part of the Berkshire, or what was substantially to the same effect?

(Objected to.)

A. No; I did not.

Q. How were you heading at the time of the collision?

A. About N. by W.

Q. At that time were or were not your sails aback by the lee?

14 A. There were no sails aback till after the steamboat struck us.

Q. Did you not say to some one on board the Scotia that, if your captain had not come on deck, there would have been no collision, or words to that effect?

A. I did not.

Direct examination resumed:

Q. How much did your vessel change her course by porting?

A. Three-quarters of a point.

Q. You were asked the question on your cross: "After the helm was put aport, how close did you come up into the wind?" and the answer is, "¾ of a point." Did you not mean by that that you changed your course so much as ¾ of a point?

(Objected to as leading. Question waived.)

Q. You were asked the question on your cross: "After the helm was put aport, how close did you come up into the wind?" and the answer is, "¾ of a point." What did you mean by that answer? Did you mean that you came within ¾ of a point of the wind, or that you altered your course ¾ of a point?

A. I meant that we changed our course ¾ of a point.

Q. How did the steamer's light bear from you when the captain went into the cabin for a light?

A. On the starboard side, forward of the beam, when he started for the light?

Cross-examination resumed:

Q. How did the steamer's light bear from you when the captain first put the light over the side?

A. Off the starboard beam.

Q. Did you at that time know whether it was a steamer?

A. Yes; we did begin then to think she was a steamer, for we saw the bright light and a red light.

Q. Did you see that red light before the captain went into the cabin?

A. Nearly about the one time.

Q. Do you know if the captain saw it before he went into the cabin?

A. I don't know; but I suppose he did, because he was standing alongside of me, and can see further than I can.

Q. How long after that do you say it was before he went in for the spy-glass?

A. About four or five minutes.

Q. And at the time he went in for the glass do you mean to say you did not know that these lights were from a steamer?

A. Not for certain; but I supposed she was, on account of her bright light and red light.

Q. How was your ship heading when she shook in the wind, after the order to luff?

A. S. E. ¾ E.

Q. How did she head after the captain gave the order to keep her full?

A. About S. E. ½ E.; somewhere there.

JAMES MILLS.

Cross-examination resumed:

The captain was not dressed when he first came on deck. I don't know what he had on, for I had not much time to look at what he had

on, because I was looking out for this ship's light. I had something else to look about except to notice what clothes the captain had on.

Q. Had you time to notice whether he had on coat, trowsers, and shoes or boots, and anything on his head?

A. I don't know; because my eyes were not directed towards the captain, although he was alongside of me most of the time, and talking to me.

Q. Were you so much occupied that you did not observe whether he was in his shirt and drawers, or had on his coat and trowsers?

A. Yes; I was. I did not think to look at the captain at all.

Q. Did he go back into the cabin after he first came on deck, except at the times when he went for the lantern and spy-glass?

A. Not till after the steamer struck us, to my knowledge.

Q. How long was it from the time you tapped at his window till he came on deck?

A. He came right out instantly.

JAMES MILLS.

Subscribed and sworn to this 7th day of June, 1867, before me.

GEO. F. BETTS,
U. S. Commissioner.

15 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this seventh day of June, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed 24th, 1789, did call and cause to be and personsonally appear before me, at my office at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Thomas Burgess, to testify and the truth to say, on the part and behalf of the libellants, in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants against The Steamship Scotia, her tackle, &c.

And the said Thomas Burgess being about the age of twenty-three years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Thomas Burgess, and he did thereupon depose, testify, and say as follows, viz:

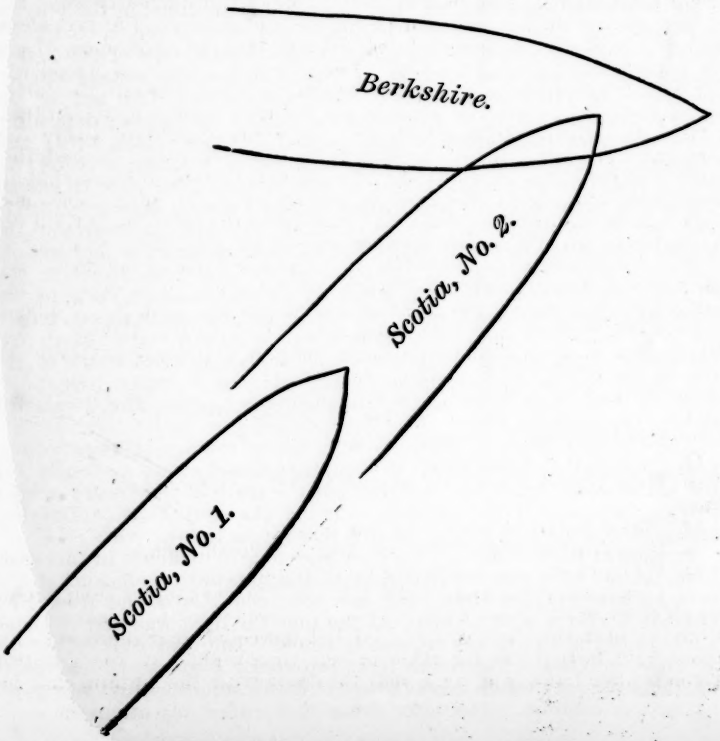
I reside in Boston, Mass. I am on here to give evidence in this case. I was second officer on the Berkshire at the time of the collision. I had been on board of her about four months. She was bound from New Orleans to Havre with cotton. At the time the light was first reported I was in the cabin; it was my watch below. The first that called my attention was that I heard the light reported. I got up in my berth and looked at my watch. I sat there. I didn't suppose there was going to be any collision. The next thing that called my attention was, I

heard them sing out, "Steamer, ahoy. Port your helm." That was from our deck. Before I heard this I saw the captain in the cabin lighting the side light, (a green light,) which he carried out on deck. I heard the captain say (but I can't tell whether before or after I saw him light the light, though I think it was before he lighted the light) to the man at the wheel, "How do you head?" And the man's reply was, "S. E. ½ E." Then the captain sings out, "Keep the ship full." Then, after the light was carried out, I heard the captain say to the man at the wheel to keep the ship off. I can't say whether it was before or after the light was carried out; I can't be certain. Then the captain calls out to him to steady his helm—to keep her so. Next thing I heard was their hailing, "Steamer, ahoy." "Port your helm." Two or three calling this out as loud as they could call. I came on deck then. The steamer was coming up on our starboard quarter. I called out as loud as I could call for them to stop their paddles. The captain called out the same. He stood right by me.

Q. Was she or not at this time moving her paddles ahead?

(Objected to as leading.)

A. She was moving them ahead. I saw the water coming out the after part of her boxes. She came down into us; struck us just abaft the fore channels. First shock the main topgallant-mast went over the side. She tore the whole side of us out—channels, chain-plates, and whole side forward. Bulwarks forward were all gone. Shortly after she got clear the foremast fell.



16 On this diagram No. 1 shows the position of the Scotia, when I first came on deck, from our vessel. No. 2 shows how she came into us. After they struck the sterns of the two vessels swung towards each other, and the two vessels remained together pounding each other by the roll of the sea. Shortly after she struck us the steamer stopped her paddles. I don't know whether she backed or not afterwards. Shortly afterwards she moved her paddles ahead again to get clear of us.

Q. If the steamer had stopped her paddles when you first saw her, would there have been a collision, in your judgment?

A. If she had stopped her paddles and backed when I first saw her, there would not have been any collision, in my judgment—if she can reverse her engine quickly. In my judgment, when I first saw her, she was not a quarter of a mile off. She was more than an eighth of a mile off. I think the flying-jibboom was carried away; am not certain of it; and I think the fall of the foremast carried that away.

Cross-examined by Mr. Lord:

I sleep in the forward cabin. I have a state-room on the port side, right close to the entrance to the cabin. State-room has a door to it; no window in the door; a window in the side of the house, looking out on deck; door opens into the cabin—a solid sliding door; it slides towards the stern of the ship, to open; door is in the forward end of side of state-room. Berth ran fore-and-aft, and was opposite door and under the window. The chief mate slept forward in the entry way; his state-room was on the port side—the same side as mine. I always slept with my head aft. I looked through the door, which was open, to see the captain light the light. I was sitting up in my berth. I was sleeping with my door open. I saw the captain when he came into the cabin to get the light. I saw him when he first came in to get a light. At that time I was sitting up in my berth. He went straight to where the lanterns were put. When he first came into the cabin he had the lantern in his hand. I didn't see him get the lantern, because that is kept in the entry way. He took the lantern on to the cabin table, and took it from there out on deck. He went from the cabin table right on to the deck. He did not go anywhere else in the cabin but to the cabin table. I saw him go to the table; it is right in front of my door. At the table he took the cabin light, and put it inside the lantern. That cabin light was standing on the cabin table when he took it. We kept it there all the time; it was hung there—tied there. I don't know what it was tied to; sometimes to one thing, sometimes to another. It was on the table, but I couldn't say whether it was tied or not. We generally have it tied when the ship is rolling. If it was tied, it was tied to a rack on the table. That rack is used to keep the dishes from falling off the table in a heavy sea.

Q. How high was the lamp?

A. I can't tell; I never measured it, but it was not a very high lamp.

Q. Was it higher or lower than six inches?

A. It couldn't be higher than six inches, I should judge.

Q. Will you swear it was lower than six inches?

A. I can't swear to what I don't know. It was a brass lamp; had no chimney to it. I don't know what was burned in it. I had seen it every night during the voyage. I didn't notice whether there was any other light burning in the cabin or not that night. It was not two seconds after I saw him come into the cabin with the lantern, that he

went out with it again. I have known the lamp to stand without being tied. I don't know whether the lamp had a stem to it under the receiver for oil or not. I know what you mean. I should think it was fifteen to twenty minutes after the light was carried out before I went on deck. After I got on deck it was, I suppose, about five minntes before the collision; I can't tell exactly. After the captain left the cabin with the lantern, I sat in my berth just as I was, listening to what they were talking on deck; and I didn't come on deck till I heard the shouting of all hands. The two vessels were together: might be ten minutes, might be longer before the Scotia got clear. The Scotia stopped her paddles directly that she came into us. She might have stopped her paddles before she hit us. About the time she hit us I saw her paddles stop.

Q. Do you mean to say that the Scotia kept her paddles going a single instant after she touched you?

A. Yes; it might be an instant after she touched us, or it might
17 not. I know just after the clip I saw them stopped. We manned the pumps after the collision, and sounded them, too. About the whole of the crew were set to pumping at first; then, when we found she was so bad, some were taken off to get the boats out. I was present here at the examination of Mr. Mills. I heard him give his testimony, but didn't give particular attention to it. I am not now engaged in any vessel; but I suppose I can get a chance, if I want one. I talk some of going in the brig Alice, with Capt. Goddard.

Q. Did you tell anybody on the Scotia that the collision was owing to your having borne away or starboarded your helm, or to the captain's coming on deck, or to mismanagement of the Berkshire, or other words to that effect?

(Objected to.)

A. No, sir; I did not.

Direct examination resumed:

I saw a large hole in our side stove in, well down by the copper, and the side was all stove in. The cook slept forward. His arm was cut. I don't think any of our crew saved their baggage. They might have saved two or three little parcels. The steamer's boat would not take our baggage.

Cross-examination resumed:

Some of the crew went to the Scotia in their own boat. They had a few bags and parcels in that boat.

THOMAS BURGESS.

Subscribed and sworn to this 7th day of June, 1867, before me.

GEO. F. BETTS,
U. S. Commissioner.

United States district court, southern district of New York:

PAUL SEARS
vs.
THE STEAMSHIP SCOTIA, HER TACKLE, &C.

HENRI VON WYNGARD, a witness produced and sworn on the part of the libellant, pursuant to the consent hereto annexed, deposes and says:

I was born in Holland; am forty years old. I hail from Rotterdam;

am going to sea as soon as I get a chance. I have followed the sea over twenty years. I knew the ship Berkshire. I was on board of her at the time of her loss, on the eleventh day of April last past. I was carpenter. She was bound from New Orleans to Havre, with a cargo of cotton. I saw the collision. I was on the pump at the time. We were pumping ship. I first knew that a ship was approaching when we saw a light approaching on the lee bow. The ship had her starboard tacks aboard at the time. I don't know what course we were steering, nor which way the wind was. The port bow was our lee bow, and the light bore about two points off the lee bow when it was first seen. I think this was about twenty minutes before she struck us. The mate was on deck at the time, and the whole port watch. I was in the mate's watch. I think at this time our ship was going at the rate of six or seven knots. I can't tell how far off the light was. I did not take notice. I was on the pumps. It was a nice night; it was not dark. I don't know how far off I could see a ship on such a night.

Q. How far, in your best judgment?

A. Probably two miles. After the light was reported the captain came on deck right away. The captain gave orders—I hardly know what orders. I can't tell what the light was that we saw—white, red, or green. The light continued to come up closer on. At the time we first discovered the light the wind was about two or three points free—that is, the yards were not braced sharp up, but the sheets were started—as the light, as it came toward us, passed the starboard quarter. We did not find out that it was a steamer before we saw the steamer herself; then we found she was coming right across our side. We could not see anything. She hit us just aft the fore rigging amidships; she struck us a glancing blow forward. All the side was out of her; all the bulwarks were out of our ship. It cut the fore rigging, and the foremast
18 went overboard. The ship had a bright light forward on the anchor stock. After the light was reported the captain lit a bright light and held it over the port side. It must be a red light. I did not note how long before the collision—I can't tell. The anchor on which the light was put was lying on deck on the forecastle. The light was four feet above the deck.

Q. Could the light be seen above the rail of the ship?

A. Oh, yes. The light was, I should say, four feet above the rail.

Q. From the time you saw the light until the time of the collision, how, if at all, were the sails of the ship altered?

A. I can't tell what alteration was made in the trim of the sails after the light was reported and before the collision. I can make a diagram of the way the ships came together, with models.

(The diagram annexed marked A shows how the ships struck.)

Q. At the time you first saw the light was not the steamer far enough from the ship to clear her under any circumstances?

(Objected to.)

A. Yes, sir; plenty of room.

(Subject to objection.)

Q. What could have been done on the ship more than you did to avoid the collision?

A. I don't believe you could do more than the captain did—keep a light over the side and lookout ahead. I was at the pump when the captain put the light over the side. The captain went abaft the main rigging to put it over the side.

Q. Do you feel sure which side, the port or starboard?

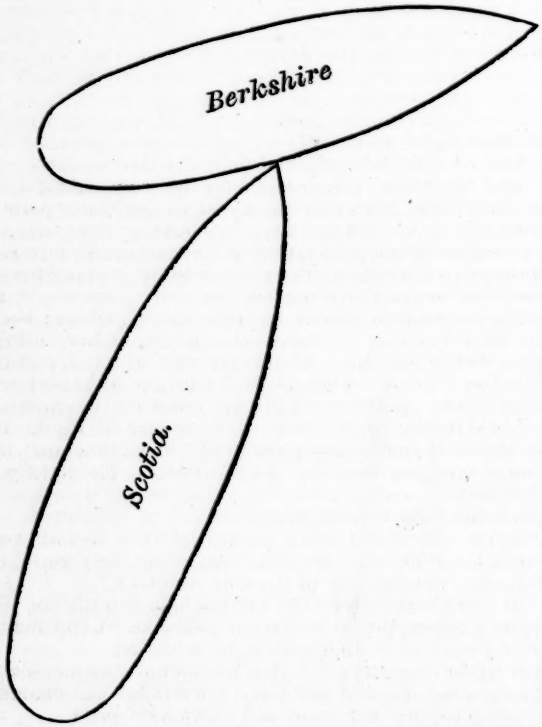
A. The port side.

Q. Do you think it was a red light?

A. Yes, sir.

Q. Were your sails ever aback up to the time of the collision on board the ship?

A. No, sir; the sails were full, but after she struck us the sails were aback. We remained an hour or two on the Berkshire after she struck us; then had to leave her. All hands left her, and went on board the Scotia. That was the last I ever saw of the Berkshire. I heard no conversation on board the Scotia concerning the accident. None of the crew saved anything of their clothes or kit—saved nothing except what we stood in.



Ex. A., D. D. L.

19 Cross-examination of Henri von Wyngard by D. D. Lord, esq.:

Q. How did the captain hold his light over the side?

A. On the starboard side, on the rail.

(Objected to as not responsive.)

Q. What did he hold it in?

A. In a lantern.

Q. Did he hold it in his hand?

A. Yes, sir.

Q. How long did he hold it in his hand?

A. I don't know that. I don't know how long he kept it in his hand.

Q. What did he do with it then?

A. I don't know; I did'nt see it afterwards.

Q. Did you make a statement to me (Mr. D. D. Lord) in Mr. Cunard's office, just after you arrived, about the collision?

A. He asked me some questions, and I made a statement.

Q. Did you not then say that you saw no colored light on the Berkshire's deck before the collision?

A. Yes, sir; I did say so.

Q. Where did the captain get the lantern from?

A. The lantern was in the cabin.

HENRI VON WYNGARD.

Sworn to before me, this 6th day of June, 1867.

GEORGE F. BETTS,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the act of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act, entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witnesses are material and necessary in the cause in the caption of the said deposition named, and that they are seafaring men bound on a voyage to sea, out of this district, and more than 100 miles distant therefrom, and that they all reside out of the district, and more than 100 miles distant therefrom.

I further certify that due notification of the time and place of taking the said depositions signed by me, was made out and served on the proctor for the libellants to be present at the taking of the depositions, and to put interrogatories, if he or they might think fit.

I further certify that, on the sixth and seventh days of June, in the year of our Lord one thousand eight hundred and sixty-seven, I was attended by the proctors for the respective parties, and by the witnesses, who were of sound mind and lawful age, and the witnesses were by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing, in the presence of witnesses, and from their statements, and after carefully reading the same to the witnesses, they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of filing the same with my own hand in the court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and seal, this seventh day of June, in the year of our Lord one thousand eight hun-

dred and sixty-seven, and of the independence of the United States the ninety-first.

GEO. F. BETTS,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the second circuit.

20 (Endorsed:) Unted States district court for the southern district of New York. Paul Sears et als., libellants, vs. The Steamer Scotia, her tackle, &c. Depositions on the part of the libellants taken before Geo. F. Betts, United States commissioner, on the 6th and 7th days of June, 1867.
Filed June 7, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and sixty-eight, I, George F. Betts, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at No. 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, JOHN J. Sowerby, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants against The Steamship Scotia, her tackle, &c.

And the said John J. Sowerby, being about the age of 34 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said John J. Sowerby, and he did thereupon depose, testify, and say as follows, viz:

I reside at Liverpool, England; am a mariner; expect to go to sea on Wednesday next on the Scotia. I was in the Scotia at the time of the collision with the Berkshire. I was chief officer. I was officer of the deck at the time. My watch came on duty at midnight. There were seven men and two officers, besides myself, placed on deck at the time. One officer, the extra second officer, was placed on the forecastle. His name was Mr. Nelson. The other officer, Mr. Chippendale, was at the con, at the after binnacle; two men on the forecastle, near each side; three men in the wheel-house, who were exclusive of the seven men above mentioned. The other five men were stationed—one at the fore funnel; one at the crank hatch; one on each paddle-box; one at after funnel. When the Berkshire's light first came in sight I was on the saloon-deck, abaft the foremast. My attention was first called to it by the report of the lookout. The report came from the

forecastle, the port side. A short time after that a report was made from the paddle-box. The first report was, "A white light on the port bow." I then immediately saw the light. My glasses were close by my side. I first saw the light with my eye, and then examined with the glass. When I first saw it, it bore a point and a half on our port bow. The color of the light I saw was white. I did not see any other than a white light. When I first saw that light it was low down, near the water; apparently just above the horizon.

Q. What did you take it for when you first saw it?

(Objected to.)

A. A steamboat's mast-head light.

Q. How, on the supposition of its being a steamer, did you account for your not being able to make out the colored light?

(Objected to as incompetent.)

A. Because they had not risen above the horizon. I supposed the steamer a long way off. The light continued to gradually open out on the port bow. It opened five or six points; that is, two or three points forward of abeam. I reckon the five or six points from ahead.

Q. Did it any time, after that, seem to close in?

(Objected to as leading.)

A. It stayed steady for a short time, and then gradually began to close in on us. When it began to close in, I immediately ordered the helm to be put to port. This order was obeyed. After that the light still kept closing in on us. I then struck the signals to the engine-room for half speed, and then gave order to stop the engine, and I sung out "Hard aport." The orders to stop the engine immediately followed the first order to port the helm. The order for half speed was after the first order to port. The order to stop was immediately after the order to half speed.

Q. Give these orders in their succession, with the periods intervening between each one, beginning with a statement of the period between the first closing in of the light and the giving of the first order?

21

A. Immediately that I discovered that the light stopped opening and began to close, I gave the first order to port—about half a minute after the gong was struck for half speed; then the orders to stop and hard a port were given as fast as they could be given. The sails of the Berkshire were not visible when I gave the last order. The collision happened in three or four minutes after the last order. I can't tell how the Berkshire was heading prior to the time that I gave the first order, to port; but I suppose that she was going to the southeastward. When I first sighted the light the Scotia was heading W. by N. ½ N. At the time of the collision, the Scotia was heading from N. by E. to N. N. E. The Scotia swung off under her port helm about seven points and a half.

Q. How did the Berkshire come against you?

(Objected to, as assuming what is not in proof.)

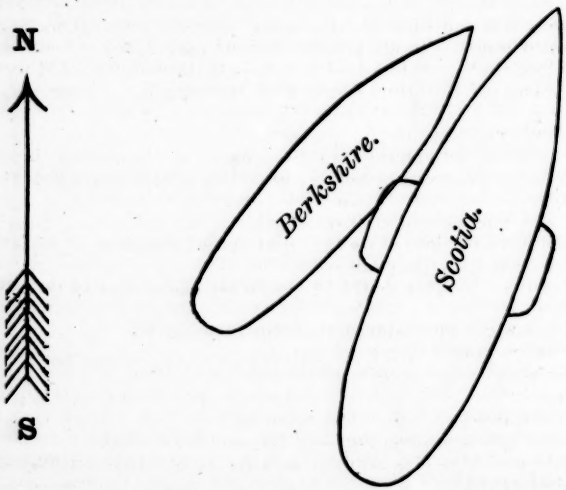
A. She fell alongside the fore part of our port sponson; about her starboard fore rigging.

Q. Was any order given to reverse the engine after the order to stop?

A. There was, immediately. An order was given to stop backing, about two minutes after the order was given to reverse. When this order was given the Berkshire was alongside our paddle-box, under the fore part of the sponson. I gave the order to stop backing to prevent our wheels from striking her. After the collision I did not see any mark on the Scotia showing where the Berkshire had struck her.

Q. How long before the collision did you first see the Berkshire's sails?

A. Immediately before. She was then a few ship's lengths off.



This diagram shows how the two vessels came together, the points of the compass being indicated by the pointers. Our headway was stopped at the time of the collision. The Berkshire was under headway at the time of the collision. That night the Scotia had a white light at the foremast-head, red light on her port paddle-box, and green light on her starboard paddle-box. They were burning brightly. They are set at sundown, and removed at sunrise. The lights were all the largest size admiralty regulation lanterns, with silver reflectors inside. That mast-head light would be visible ten miles in a clear night, and the colored lights six miles. I sent an order aft for rockets immediately after the light was reported. I heard rockets going off before, that night, when I was lying abed, and it was entered on the log slate as rockets sent up for a steamer we met. We burn one blue light and two rockets as our night signal. I don't know what the other steamer was.

22 Cross-examined by Mr. Donohue:

The log of that voyage is on board the ship. There was one kept. We left Liverpool April 9th, in the middle of the day; can't say the hour; the log will show. We called at Queenstown on our way. We got there some time in the fore part of the day; can't tell nearer than that; the log will show. We left there three to four p. m., Sunday. I don't recollect when we arrived in New York; log will show. Up to the time we made this light, we had been going our ordinary course and speed. It was an ordinary clear night; I think not starlight. The moon had set some time; can't say whether there were clouds or not.

Q. Was it what you call a clear night?

A. Yes. The Scotia belongs to the Cunard line. She is one of the fastest of that line. The Russia is faster. The Scotia is a side-wheel steamer. I did not see the light until it was reported; that called my attention to it. I don't know the name of the man who reported it.

When I first saw it, it was a point and a half to two points on our port bow. I then judged it to be seven or eight miles off; I am not of the same opinion now. I now think that it was four to five miles off when I first saw it.

Q. Did it not continue in the same course it was on when you first saw it till it got five to six points off your port bow?

(Objected, that question does not sufficiently specify whether it refers to the course of the Berkshire, or to its change of bearing from the Scotia.)

A. I don't understand the question.

Q. Was there any change in the course of the object bearing that light, so far as you could observe, until it got five to six points off your port bow?

A. I can't understand that question. If it means that there was any difference in the bearings of the light after I first saw it, I cannot make any other answer to that question.

Q. Were you looking at that light to see the course of the object that bore it?

A. If it means, by "course," the bearings of the light, I was looking.

Q. When you first saw the light, did you form any judgment how the object bearing it was steering?

A. Yes.

Q. How did you judge it was steering?

A. In an opposite direction—to the southeastward.

Q. Did you judge it heading in an exactly opposite direction, or more to the southward?

A. I judged them to be going somewhere in an opposite direction to the Scotia.

Q. Was that the nearest judgment you then formed?

A. Yes.

Q. Did you afterwards form a judgment that the object had changed her course?

A. Yes; just before the collision.

(Objection to last part, by Mr. Donohue, as not responsive.)

Q. How near to you was she when you formed this last judgment?

A. I should say a mile to a mile and a half.

Q. Up to that time, when you formed that second judgment, which you now speak of, had you formed any other as to her course?

A. No.

Q. When you so formed this second judgment that you speak of, had that light got five or six points off on your port bow?

A. Yes.

Q. The first change you observed in the course of this light was when she was about five or six points off your port bow, and, to the best of your judgment, a mile and a half off. Is that so?

A. Yes; if by course is meant bearings.

Q. Were you making any effort to observe the course of that light?

A. I don't understand what you mean by course; if by "course" is meant "bearings," I was observing it.

Q. Did you form any judgment, when you first saw the light, as to what the course of the object bearing it was?

A. I supposed she was a vessel going in the opposite direction.

Q. Was it not part of your duty to ascertain, if possible, the course of that object?

A. Yes.

Q. Do you think now that you were mistaken in forming either of

the judgments you have spoken of in your testimony as to these courses and the distances at which they occurred?

A. I am still of the same opinion, except that I thought then she was a steamer, while now I know she was a sailing vessel.

Q. You say you observed a change when, you think, she was about a mile and a half off, and that she commenced closing in; was that a gradual or a sharp closing in?

23 A. A sharp closing in.

Q. And after it commenced you ordered the helm ported?

A. Yes.

Q. Did you then think there would be a collision?

A. No. After porting we ran on that helm but a very short time before I thought there would be a collision: can't say how many lengths we ran before I thought so; perhaps a couple of minutes.

Q. How did the light then bear when you thought there was going to be a collision?

A. I didn't observe. It was rapidly closing up to that time. I had seen but the one white light, and I couldn't form any idea then how far the vessels were apart. Immediately after that I ordered the vessel stopped and backed.

Q. From the course which you supposed the vessel bearing that light to bear when you first saw her, up to the position which your diagram in the deposition shows, how many points must that vessel have gone around to get there?

A. About seven or eight points—I mean the Berkshire. When the two came together, I judged the Berkshire to be heading about N. E. by N. The rockets were discharged right aft when they are sent up, under the direction of the officer of the con.

Re-direct:

Q. From what you have learned since the collision, do you suppose the Berkshire was as far or further than a mile to a mile and a half when she began to close in?

A. I think she must have been closer—I mean nearer.

JNO. J. SOWERBY.

Subscribed and sworn to this 27th day of April, A. D. 1868, before me.

GEO. F. BETTS,
U. S. Commissioner.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Steamship Scotia, &c. Deposition. John J. Sowerby, chief officer "Scotia," for claimants.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and sixty-eight, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail

in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Hamlyn Chippendall, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants against the steamship Scotia, her tackle, &c.

And the said Hamlyn Chippendall, being about the age of twenty-nine years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Hamlyn Chippendall, and he did thereupon depose, testify, and say as follows, viz.

I reside in Liverpool, England. I am a mariner, Expect to sail Wednesday, on the Scotia. I was fourth officer of the Scotia at the time of her collision with the Berkshire. I was on deck at the time, Stationed at the con, in the after part of the ship. The duty of the officer at the con is to see that the ship steers her course. I saw the Berkshire's light before the collision. My attention was first called to it by the chief officer sending aft to get rockets ready, supposing it was a steamer. I did not hear it reported previously to that by the look-out. My station was 180 feet abaft the bridge. We had not
24 previously fired any rockets in our watch that night. When the order came for the rockets I immediately walked from where I was standing to the ship's side. I saw the light then, and it bore a point and a half to two points on our port bow. I was standing on our port quarter when I saw it; that is, 12 to 14 feet from my position at the con, across ship. Where I stood to look at the light was just abreast of the after compass. From where I stood I saw the light on the outside of the paddle-box. I took it for a bright light. It appeared to be just above the horizon. I did not stay any time to watch the light, but went back immediately to the compass. I saw the light again before the collision—about three to five minutes before the collision. It then bore before the beam. Shortly after the order came to get the rockets ready, I received an order to port the helm. The chief officers gave that order. The helm was put hard aport. Another order was given after that to the helm. That second order was hard aport. I cannot say exactly how long this was given after the first order to port—not immediately; a short time intervened. The helm had been put hard aport before this second order came.

Q. Why did you put it hard aport immediately on getting the first order, and without waiting for the second?

(Objected to as incompetent.)

A. It is usually done at night time, so as the ship shall answer her helm quickly. This second order was given to the helm five to eight minutes before the collision. Our ship swung off seven points and a half under her port helm before the collision. We were heading W. by N. ½ N. before the first order to port was given. When the ships came together we were heading N. by E. ½ E. I know how the ship was heading at these times because I was standing looking at the compass. That compass was 12 or 13 feet forward of the wheel-house. That compass is compensated. It gives the true magnetic bearings. There is a compass in the wheel-house. That is not compensated.

Q. Do you know how the compass in the wheel-house varies from the one at which you were standing when the ship is running due west?

A. I do not. There were three men in the wheel-house. One of them was outside when the first order came to port. He had come out to set the rockets off. When the order came to port he went down again into the wheel-house, and laid hold of the wheel along with the men who had it previously. Two men were at the wheel engaged in pulling it over under that order. Our headway was stopped previously to the collision—stopped entirely.

Cross-examined by Mr. Donohue:

I mean by the mate sending aft for rockets that a man came aft for them. The rockets are kept in the wheel-house. I didn't go there for them; I called out to the quartermaster to get them. I didn't go abaft where I was till after the collision. I went to the side of the vessel, 150 to 170 feet abaft the paddle-boxes, and the bridge is across from one paddle-box to another, and between the two funnels. I should imagine the paddle-boxes were over twenty feet wide. The ship is wider at the paddle-box than there where I stood—considerably wider. I saw the light outside the paddle-box, just clear of it, not well clear of it.

Q. You say in your direct examination that you received an order to port?

A. Yes; and then the helm was put hard aport by my orders. The mate had not given an order to hard aport before that.

Q. Then why was it put hard aport on the order to port?

A. It is well understood with the officer in charge of the watch and the officer at the con, when he gives an order to port or starboard, that the helm is to be put hard over at once. After I had put the helm hard aport I got an order hard aport. We had run two or three miles between these two orders. When the order came to hard aport our helm was still hard aport, and I replied that our helm was hard over, and we kept it so till the time of the collision.

Re-direct:

It is understood that the helm is to be put hard over, because she will answer her helm more quickly with it put hard over. I have frequently received orders from Captain Judkins to do so, more especially in night time and foggy weather.

Q. Have you any general order to do this in the day time and in clear weather?

A. No, sir.

Q. Do these general orders to put the helm hard over apply to any other than night and foggy weather?

A. No.

HAMLYN L. CHIPPENDALL,
4th Officer R. M. S. Scotia.

Subscribed and sworn to this 7th day of April, A. D. 1868, before me.

GEO. F. BETTS,
U. S. Commissioner.

25 (Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Steamship Scotia, her tackle, &c. Deposition. Hamlyn Chippendall, 4th officer "Scotia," for claimants.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and sixty-eight, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles H. E. Judkins, to testify and the truth to say, on the part and behalf of the claimants, in a certain suit or matter of controversy, now depending and undetermined, in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants, against The Steamship Scotia, her tackle, &c.

And the said Charles H. E. Judkins, being about the age of fifty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Charles H. E. Judkins, and he did thereupon depose, testify, and say as follows, viz:

I live in Liverpool, England. Am master mariner. Expect to sail in the Scotia Wednesday. On the night of this collision I left the deck a little after 12 o'clock, having previously seen a steamer going eastward, and a sailing ship going eastward, to which the night-signals were given. I had just fallen into my first sleep, when I heard the steamer blowing off, my room being alongside of the steering wheel. I ran up on deck as soon as possible, having heard one blow that was given to our ship, and I immediately asked of the officer at the con, Mr. Chippendall, (objected to,) "How is her head?" He replied, "N. N. E." I ran forward to the top of the paddle-box and took my station there, and saw over the side of the paddle-box that our wheels or sponson was not touching the Berkshire—were quite clear of her—they having separated from each other by the Berkshire's sails being all aback by the lee, and the Scotia having her fore and aft sails set, had drifted bodily off. Seeing this, I called out to the officer at the con, "Are you all clear aft?" To which he replied, "Yes; all clear." I then gave orders to the engine to be turned ahead, and after getting a little way from her, I stopped the engines and turned them back, expecting that, by laying under their lee, that they would send boats. We could hear them singing out "Send your boats," and I sent for Mr. Sowerby, who came to me on the paddle-box, fearing it might be an emigrant ship, to get the big life-boats cleared and ready; that I would take the Scotia round the Berkshire's bow, and so get to windward of her, and drop my boats that they might go alongside of her easily, while I got under her lee quarter. I found there were two of the crew of the Berkshire already on board of my ship, and I learned from them that she had only 18 souls on board, all told; so I countermanded the order to clear the large boats, and I sent two of the smaller boats alongside; received the crew on board, and

proceeded on the same course, W. by N. ½ N. There are four places on deck in the ship where I can ring bell or gong to the engine-room, and so give orders. But if the officer of the deck is not near either of these bell-pulls, he communicates his orders to the engine-room by word of mouth through a man who is always stationed at the crank-hatch expressly for that purpose. Which way the order is communicated depends on where the officer is when he wishes to give the order. It takes about two minutes, when the ship is under full speed, to get the wheel hard over from amidships. The collision took place immediately after I heard the steam blow off. I had just time to put on my socks, and my trowsers were part way on, when the blow came. I thought it was a crack of the engine, not a collision. I did not find any mark on the ship of the collision. I examined her carefully next daylight, and took the captain of the Berkshire around with me to make the ex-
26 amination. The lower edge of the paddle-box was chafed, and the spur that supports the knuckle of the paddle-box was broken; that is, outside of the ship and forward of the wheel.

Cross-examined by Mr. Donohue:

That spur is a piece of iron—a round rod, eight inches, about, in circumference. I only felt one blow—I fancied that was a crack. It was a fine night when I went below, with a breeze on the water. The moon had gone down about 11½. The stars were out. I thought there couldn't be a collision because it was so clear a night when I went below at 12½. I didn't notice when I came up that there was any change, or whether there was or not; although, when the Berkshire, while lying a little distance from us, with my glasses, I could not make out any particular object. I could'nt see whether boats were alongside of her or not, or whether they had left her, though I looked anxiously. This was after my boats had gone to her. When I came on deck the wind was about S. W., as near as I can judge. I can't tell how the Berkshire was heading, except that she laid alongside of us, with her head pointing the same way as ours; her yards were braced sharp on the starboard tack.

Re-direct:

Q. Do you wish to make any explanation?

(Objection to statement of desires, inferences, or wishes.)

My desire was, from the ships drifting apart so fast, that the boats should get back, and not have a long way to pull; for if I could have discovered them with a glass, I would have relieved them of coming some of the distance.

Re-cross:

Q. Was any change made in your sails after coming on deck?

A. Yes; After getting clear of the Berkshire, and having gone ahead, and then reversed, and backed under her lee quarter, I gave the order to take in the fore and aft sails. No other change was made in my sails but that; those were the only sails set.

Re-direct:

I took in our fore and aft sails because they made us drift to leeward.

C. H. E. JUDKINS.

Subscribed and sworn to this 27th day of April, 1868, before me,

GEO. F. BETTS,

U. S. Commissioner.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Steamship Scotia, her tackle, &c. Deposition. Captain Judkins, of "Scotia," for claimants.

U. S. district court.

PAUL SEARS AND OTHERS
vs.
THE STEAMER SCOTIA, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

JOHN CLARKE NELSON, a witness examined de bene esse, by consent, in this case, being duly sworn, saith:

I am now extra second officer of the Scotia, and such at the time of the collision with the ship Berkshire. I had been in this situation on the Scotia only from the commencement of that voyage. I had then been thirteen months in the employ of the Cunard line. I was made second officer in the line on the 30th December, 1866. I had before that been third officer, and was then promoted. At the time of the collision it was the port or chief officer's watch. I was in that watch. The collision happened between half past one and two o'clock. It was a
27 clear night, but no moon. When I first saw the Berkshire's light I was standing abaft the port cat head. The first officer was somewhere about the foremast on the same deck. We had, as lookouts, two men on the forecastle, one of whom was on each base, one man on each paddle-box, one man standing before the fore funnel, another man by the crank-hatch, and a third by the after funnel. These three last men were set at these stations to pass orders fore and aft. We had three quartermasters in the wheel-house, and an officer at the con at the after binnacle. These are the regular stations that the men always occupy from dusk till daylight. The Scotia at this time had a bright light on the foremast, a green light on the starboard side, and a red light on the port. The bright light was underneath the top, and, I think, about fifty feet above the deck, and the deck was about twenty-two feet above the water. It was a copper lamp, with three glass sides to it. The green light was placed outside of the starboard paddle-box; this was about ten feet above the deck. The red light was in a corresponding position on the port paddle-box. These colored lights had screens to prevent them from being showed on board. All these lights were burning brightly at the time of the collision, and had been burning brightly from the time when they were first lighted, which was the evening of that night. The first I saw of the Berkshire was a white light, and it bore a little on our port bow; about two points, as near as I can give it.

Q. Did this light open any after you first saw it?

(Objected to, as leading.)

A. It did, as near as I can give, another point; after that it stopped opening, and remained in the same position. After it stopped opening, I did not hear any order given to the wheel. It stopped opening three or four minutes before the collision. I saw the Berkshire's sails about two minutes before she actually came in contact. When I saw her sails she bore about the same as when she stopped opening. She came in sight by getting broadside on. I never saw any colored light on the Berkshire. I kept sight of her light from the time when I first made it out until the collision. When I saw the vessel's sails, I inquired as to the helm.

Q. What inquiry did you make?
A. If the helm was aport.
(Objected to as leading.)
Q. What answer was returned?
(Same objection.)
A. Either port it is or hard aport.
Q. Is there any general order in your ship as to how far over the helm must be put, on orders to port or starboard given at night or during darkness?
(Objected to as incompetent.)
A. It is always put hard over in those cases.)

Cross-examined:

Witness says: I first saw the light. My attention was not called to it. I judged it then to be about four miles—three to four off. I reported it to the chief officer. I reported a light on the port; nothing more than that. I got no reply to that. I did get a reply: "Yes, I see it."
Q. What was the next thing you heard on board of your vessel said, either by yourself or any one else?
A. The order was passed to get rockets ready—ready to signalize her. One of the ship's hands gave that order.
Q. What was the next heard or said?
A. I did not hear anybody say anything after the rockets.
Q. Did you hear any one say anything on board of your vessel, or did you say anything yourself after that until the collision?
A. No; I made no remarks, and did not hear any one else say anything.
Q. When you saw the vessel or her sails first, she was then heading broadside across your course; is that so?
A. Yes, sir; or thereabouts.
Q. And up to that time, after she had got three points off your port bow, the light had not changed its bearings?
(Objected to as indefinite.)
A. Up to that time it bore about that.
Q. How far was the vessel off when you saw her sails?
A. I could not judge of the distance.
Q. Can you give no idea?
A. Half a mile off.
Q. How many of a crew have you that is connected with the sailing department, including officers?
A. Fifty-two or fifty-four: captain, mate, second mate, extra second, extra third, extra fourth, boatswain, boatswain's mate, six quartermasters, lamp-trimmers, boalsen, yeoman boalsen, mate's yeoman, twenty-two men in each watch, then carpenter and joiner, sail-maker. When I said that I was standing abaft the port and cat-head, I mean that I was so close I could touch with my foot. I had been there
28 since midnight—since the watch had changed—and had not left that position from the time when I came, at twelve o'clock. The persons I have named all hold certain stations—would keep them until two o'clock.
Q. Would they or not be relieved by persons in that same watch?
A. They would.

Direct resumed:

Q. When you first saw the Berkshire's sails, how did she bear from you?

A. Between two and three points on our port bow.

Q. If she was two or three points on your port bow, what do you mean by saying, in cross-examination, that she was three points, heading broadside, across your course?

A. I mean that the flat of her sails was presented to me.

Q. Could you then make out the hull of the ship?

A. No; I could make out the dark form of the sails against the sky.

Q. Why was the order passed for rockets?

(Objected to as incompetent.)

A. We supposed her to be a steamer.

Q. Why did you suppose her to be a steamer?

A. Seeing a bright light, as no other vessels carry a bright light.

Q. Had you passed any other sailing vessels before this one the same night?

A. We had.

Q. What light had she?

A. We saw her red light.

Re-cross:

I cannot give the names of the different persons on the different stations I have stated. I can give the name of neither, but the chief officer.

Q. Do you mean to say that, in your judgment, when you first saw the sails of the ship she was heading across your course?

A. No; I could not say whether she was heading across.

Q. What did you mean by saying she was heading across your course?

A. It was very evident that her broadside was presented to us, but whether she was going across our course or not I could not say.

Testimony having been read to witness, he desired to make a statement, which libelants' counsel objects to, unless taken down; subject to this, witness says, that he did say something between the time of reporting the light and the collision. I inquired if the helm was aport; and on thinking over my answer about the distance of the vessel off, she bore nearer to right ahead than three points, as I have previously stated.

JOHN CLARKE NELSON.

Sworn to before me 23d Nov., 1867.

[SEAL.]

DANIEL LORD, JR.,
Notary Public, City of New York.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Scotia, &c. Deposition of John Clarke Nelson.

U. S. district court.

PAUL SEARS AND OTHERS
ag'st
THE SCOTIA, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

ANDREW HERON, being sworn and examined de bene esse, by consent, saith:

I was engineer of the Scotia at the time of her collision with the Berkshire—third engineer. I have been engineer of sea-going vessels about eight years and a half. I had charge of the engine-room at the

time of the collision. Mr. Taylor, the sixth engineer, was in my watch. I came on duty at midnight. I cannot tell exactly when the ship struck; from the engine-room we cannot see what is going on outside. I did not feel any blow. I knew there was a collision from hearing of it; about this time an order was given to stop the engines. It was passed by word of mouth, but I can't tell by whom. It was about fifty
29 minutes past one o'clock, as near as I can remember; the time was entered on a slate lying on the board in the engine-room. After getting the order to stop, I stopped the engine; it took two or three seconds. After the order to stop, the order was given to turn back. Just as this order was given I was relieved by Mr Ferguson, second engineer. He immediately turned the engines back. It took him two or three seconds to get the first backward motion of the wheel. I remained over two hours after this in the engine-room, but did not work the engine after stopping. The engine was moving backwards for perhaps a minute, perhaps not so much, not over; then the order was given to stop, and the engines were stopped; then several minutes elapsed before we started again. I live in Liverpool. I am still in the Scotia; expect to sail in her next Wednesday.

Being cross-examined he said:

The engine-room is about amidships. I first took the engine on that night at 12 o'clock, midnight. My watch was to be four hours, and I was regularly to have charge of it the whole of that four hours. The steam had been blowing off, and the second engineer came into the room. I let steam off before I got the order to stop; this was because the engines were at half speed some time before stopping. They had been at half speed not over a minute; the way they came to be at half speed was that the gong was struck for half speed. Can't tell you who struck the gong. The wire connecting with the gong leads to the upper saloon deck and also to the paddle-boxes. That is a common way of giving an order to the engine-room. The letting off of steam is made necessary by the running at half speed even for a minute; the steam would otherwise ease itself off. After I was relieved I attended to my duties below on the boilers. I could see perfectly well, from where I was below, the second engineer when he was backing the engine. The first I heard of the collision was this: after we had been stopped for some time, I asked a fireman what the reason was, and he told me we had come into collision with a ship. I allude to the stopping I mentioned on my direct examination. I did not make this inquiry of the fireman before the order came to back. It was after the order came to back that I made this inquiry. I can't tell how long it was after the order came to back that I made this inquiry of the fireman. You may say ten minutes, if you please. I cannot say whether it was before or after I went from the engine-room to attend to my duties below. The first order I got was an order by the gong to half speed; the next order was by word of mouth, to stop; the next was also by word of mouth, to back; the next was by word of mouth, to stop engine. It was several minutes after this last order to stop before we went ahead again. I cannot tell the time when I first heard of the collision. I wrote something on the slate; I wrote it at four o'clock; did not write anything before. Nobody wrote anything on the slate from twelve o'clock till four. I have no idea about how long it would take to stop the ship entirely when she is going at full speed. When the ship is to be stopped, the first order is generally to half speed, then slow, then stop, then turn back. All these orders would

be executed by me, as circumstances were that night, and, with the assistance we then had, in two minutes and a half. Orders are not commonly given by word of mouth; it is commonly done by the gong, but it varies. Orders are given by word of mouth sometimes, because it is more convenient to where the captain stands. It does not indicate haste in the least. I looked at the clock that night pretty often. 1.50 was the time our clock indicated when we got that order; I know it, because I looked at the clock immediately after I stopped the engines. We always do this. I don't remember the fireman that told me there had been a collision.

ANDREW HERON.

Sworn to before me, this 24th day of April, 1868.
[SEAL.] DANIEL LORD, JR.,
Notary Public, City of New York.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Steamer Scotia, &c. Deposition of Andrew Heron.

30 U. S. district court.

PAUL SEARS AND OTHERS
ag'st
THE SCOTIA, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

DAVID GRIFFITHS, being duly sworn, and examined de bene esse herein, saith:

I am thirty-one years of age, and have followed the sea fifteen years. I live, when at home, at Liverpool, England. I have been about four months in the Scotia. I was in her at the time of her collision with the Berkshire. I was on deck at the time, in the chief officer's watch. I had been on deck since twelve o'clock, midnight. I was stationed on the after funnel; this is about twenty or thirty feet abaft the bridge, and over one hundred feet, I should think, forward of the wheel-house. I was stationed there to pass the word to the officer on the con. My attention was first called to the Berkshire by her light being reported by the man on the forecastle-head. As soon as I heard it reported I looked for it. I saw it about a point and a half on the port bow; it was a white light. I did not notice whether or not it opened on our bow before our vessel's helm was shifted. I heard the helm ordered aport by the chief officer. This order was given six to seven minutes before the collision. After this the light opened, getting five or six points on our port bow. I heard orders to the engine-room to stop the engine; they were given by the chief officer. This was two or three minutes after the order to port. I did not make out what the light was until she was nearly alongside; I should think about three hundred feet off. I did not at any time see any light on the Berkshire, except the white light. I knew a man named . I don't know where he is. I don't know where he lives. I could not say where he lived when I last saw him, unless he was living in Liverpool.

Cross-examined by Mr. Carter:

My position on board the Scotia was seaman—able seaman. This collision took place, as nearly as I can recollect, about quarter past one. I had been at my station over an hour. I saw the chief officer

walking the decks before the collision took place. I could not say what man it was that reported the light. When he reported it he said, "Light on the port bow." I heard nothing else said at that time, only by the chief officer answering, "All right." I discovered the light as soon as I looked for it. I could not say how far off it was. It might be a mile off. I don't know; that is as near an idea as I can give of the distance off. It might have been a mile and a little more. The chief officer at that time, when the light was announced, was on the fore saloon deck; that was about 30 or 40 feet from the break of the forecastle. The chief officer at that time was between two and three hundred feet from where I was standing. I passed word and order both that night. I passed an order to port; passed it only once; passed it to the officer on the con.

Q. Can you give the exact words of that order?

A. Yes, sir. The order was given to port; I sung out, "Port."

Q. Did you say any other word in passing that order except "port?"

A. I did not at that time. The second order was given to hard aport.

Q. When was this second order given?

A. Shortly after the first one.

Q. How long after?

A. A minute or two afterwards. The chief officer gave that second order. I could and did see the chief officer when he gave these orders. He was standing on the fore saloon deck, near the foremast, on the port side. I stood on the port side of the after funnel. No one else gave any order except the chief officer, that I heard of. The light was not reported again by anybody that I heard. The order was given to the engine-room four or five minutes before the collision. That was an order to "stop." Another order was given to the engine-room to turn back. No other order was given that I heard. The order to stop was first given. About a minute or so after the order to stop was given, the order to back was given. The chief officer gave these orders himself. He went to the crank hatch to give these orders. Orders to the engine-room are always passed down the crank hatch. The crank hatch was about fifteen feet from where I was standing. Cannot tell exactly to a foot. The light never got so far on our port side as abeam. I saw the Berkshire's sails when she was very near alongside of us. When I first made out her sails, she was just on our port bow—about a point on our port bow. She was close to us at that time. I did not take any bearings of her. Could see what way she was heading. She was heading across our bow at that time.

31 Reëxamined:

I do not know how long the Scotia is, nor how far from the stern the after funnel is. I supposed the foremost was two or three hundred feet forward of the after funnel. I expect to go to sea in the Scotia on Wednesday. I came out in her.

DAVID GRIFFITHS.

Sworn to before me this 24th day of April, 1868.

[SEAL.] DANIEL LORD, JR.,
Notary Public, City of New York.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The steamer Scotia, &c. Deposition of David Griffiths.

United States district court.

PAUL SEARS AND OTHERS
ag'st
THE SCOTIA, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

DANIEL TAYLOR, a witness examined de bene esse, by consent, being duly sworn, saith:

I was sixth engineer of the Scotia at the time of her collision with the Berkshire. I was on duty in the engine-room. I first learned of the collision after we had done backing, and I went on deck where I heard. Some time after the collision, I saw her at a distance. Previous to the collision we received orders to half speed, then to stop, then to turn back, then to stop; which meant to stop backing. There was, to the best of my recollection, a few seconds between the order half speed and the order to stop; about the same time between the orders to stop and turn back. These orders were obeyed by Mr. Heron and myself, except the orders to turn back, and stop turning back, which were done by Mr. Ferguson and Mr. Duncan.

Being cross-examined, he said:

It was about a minute and a half after the order to "back" that the second order to stop was given. I felt no blow when the vessel struck; knew there was something out of common taking place. I could not say who told me there had been a collision. I heard of it on deck. I had gone on deck to attend to my duty, looking after the engine. I went to look at the crank shaft and crank pins. I heard of the collision as soon as I got on deck. I went on deck at the time they were turning back the engines. I forget whether I was on deck or below engine when I heard the second order to stop When the ship is under full speed, and it is desired to stop her as speedily as possible, the orders are generally these: "Half speed," "Slow," "Stop."

DANIEL TAYLOR.

Sworn to before me this 24th day of April, 1868.
[SEAL.] DANIEL LORD, JR.,
Notary Public, City of New York.

(Endorsed:) 21, 38. United States district court. Paul Sears et al. vs. The Steamer Scotia, &c. Deposition of Daniel Taylor.

32 U. S. district court.

PAUL SEARS AND OTHERS
ag'st
THE SCOTIA, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

DANIEL HYNDMAN, a witness examined de bene esse, by consent, saith:

I am thirty-seven years old; have followed the sea twenty-one years. I was in the Scotia at the time of her collision with the Berkshire; I was at the wheel at the time. When our watch came on deck there were three men in the wheel-house. There are always three men in the wheel-house; one to stand by the man at the wheel to give a hand when it is

wanted; the third man is there to fire rockets or something else when wanted. I did not hear the Berkshire's light reported. I did not see her at any time before she struck us. I did not feel the shock when she did strike. I do not know when she struck. I saw her afterwards. I heard orders hard aport just before the collision; these orders were obeyed. I put the wheel over with the assistance of the other two men. Our ship swung around some, about a point and three-quarters, perhaps a little over that, but not much, by the wheel-house compass. I did not see any lights on the Berkshire; I saw her masts over the paddle-box.

Being cross-examined, he said:

The first order I got was hard aport. This was from three to five minutes before the collision. I received no order before that. When that order was given there was only myself inside the wheel-house; one of the other men was standing on the saloon, close to the wheel-house window, where we generally fire the rockets off. He had two rockets and a blue light; he fired off neither rockets or blue lights. He had been ordered to get out his rockets. The chief officer sent an order forward to get two rockets ready. The rockets are alongside of us, in the wheel-house. I heard the order for the rockets given; it came to the wheel-house. This order for the rockets was given about ten minutes before the order to hard aport was given. The other man was standing outside of the wheel-house, beside the door. The names of these men were John Nelson and John Cassidy. Cassidy had the rockets. Both of these men jumped in immediately to help me put the helm down; the officer on the con gave the order to me. I suppose it took us three or four minutes—a little better than that. There was a little bit of a sea on. It takes two and a half turns of the wheel to get the helm down. The chief officer did not come to the wheel-house at all. I know how we were heading before the order to hard aport was given; we were then heading west three-quarters south, by the port compass in the wheel-house. We had sails set—the fore and afters; at least, the main one, and, I suppose, the fore also. The wind was southward and westward. They had not hove the log in our watch, not till after this happened. I suppose, about the ordinary rate of speed; did not observe any particular diminution of speed at any time before the collision. I saw the Berkshire's masts over the port paddle-box.

Re-direct:

I understand, by "speed," the speed of the ship. When I am in the wheel-house I can tell the speed of the ship, when we heave the log. The officer on the con heaves the log. I do not heave it; I only know the speed from what he tells me. When we don't heave the log, we can't tell; we guess, from looking over the side. I do not remember looking over the side before the collision; the speed might have diminished without my noticing it. When the wheel is amidships, it takes two and a half turns to heave it down; it has ten spokes, and there were three of us turning it over. It takes some time to heave it over when there is a sea on. I did not say it took five minutes to heave that wheel over; I said it took three, or perhaps more; this, I think, is what I said, and what is right.

Cross-examined:

I can tell by the feeling whether a ship is going fast or slow.

Reëxamined:

By the feeling I mean by the shaking, and a good many ways; by the shaking of the deck where I am standing.

33 Q. If the engine was going fast, and the ship was not going fast, would there be the same shaking?

A. No, I don't think it would; I think she would shake more if under way.

To libellant's counsel:

Q. Does the feeling of the air, as you go through it, help you to tell how fast you are going?

A. It does.

Q. And also the sound of the waters alongside?

A. That does not help me to tell.

Re-direct:

Q. Can you feel the wind when you are shut up in the wheel-house?

A. No; not when the windows and doors are closed.

Q. Can you tell by the wind how fast you are going, except when on deck?

A. No, sir. I am still on the Scotia, and expect to leave in her on Wednesday. I live in Liverpool.

DANIEL HYNDMAN.

Sworn to before me this 24th day of April, 1868.

[SEAL.] EDWIN. F. COREY, SEN.,
Notary Public, City of New York.

(Endorsed:) '21, 38. U. S. district court. Paul Sears et al. vs. The Steamer Scotia, &c. Deposition of Daniel Hyndman.

U. S. district court.

PAUL SEARS AND OTHERS
vs.
STEAMSHIP SCOTIA.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

JOHN JAMES CASSIDY, a witness examined de bene esse, by consent, being duly sworn, saith:

I was quartermaster of the Scotia at the time of her collision with the Berkshire. I had been quartermaster of her three or four years. When the collision occurred I was at the starboard side of the wheel.

Q. Was any order given to the wheel shortly before the collision?

(Objected to as leading.)

A. Yes. Port.

Q. Was this order obeyed?

(Same objection.)

A. Yes.

Q. How far over was the helm put on this order being given?

A. There was a second order—hard aport—and the helm was put hard aport. There were three men at the wheel. All took hold to put it over. It takes from two and a half to three turns to put it over from amidships. I do not know what the diameter of our wheel is. We had not got the wheel hard over when the second was given. I was on the starboard side of the wheel; another quartermaster was on the port side of it; the third one was between us two. I did not feel any collision nor see the Berkshire until she was alongside of us.

Cross-examined:

Witness says: We had changed our course—I can't tell how many points—before the vessel was alongside. I can't give any judgment by the compass we have. We can't tell how far she goes off.

34 Q. How long had your wheel been hard aport from the time you had it hard aport until you ran the vessel alongside?

A. Almost two minutes. The names of the other quartermasters with me were Daniel Hyndman, John Wilson. I got my order to hard aport from Mr. Chittenden, I expect; I can't tell; it was dark. I heard an order from the deck twice—port, and then hard aport.

Q. How long between them?

A. I suppose a minute or two.

Q. Did you follow the order in each case as soon as given?

A. Yes, sir.

JAMES CASSIDY.

Sworn to before me this 25th November, 1867.

DANIEL LORD, JR.,
Notary Public, City of New York.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Steamer Scotia. Deposition. John Cassidy, quartermaster of "Scotia."

The President of the United States of America to W'm Gandy Bateson, John Park Robinson, and Christopher Morris, esquires, of Liverpool, England, solicitors, greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioners, and by these presents do give you, or either of you, full power and authority, diligently to examine upon their corporal oaths or affirmations, before you to be taken, and upon the interrogatories and cross interrogatories hereunto annexed, William Curll, John O'Neil, Henry Hermann, and Henry Vail, as witnesses on the part of the claimants, in a certain cause now pending and undetermined in the district court of the United States of America for the southern district of New York, wherein Paul Sears and others are libellants, and the British Steamer Scotia, her tackle, apparel, &c., the British and North American Royal Mail Steam Packet Company, claimants.

And we do further empower you, or either of you, to examine on the same behalf, and in like manner, any other person or persons who may be produced as witnesses before you; and we do hereby require you, or either of you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hands and seals, directed to D. D. Lord, esq., 45 Exchange Place, New York, at the city of New York, as soon as may be convenient after the execution of this commission, and that you return the same when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the Honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York, at the city of New York, this twenty-first day of January, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-second.

[L. S.]

GEO. F. BETTS,
Clerk of the District Court of the United States for the Southern District of New York.

The execution of this commission appears in certain schedules hereto annexed.

WILLIAM G. BATESON,
Commissioner.

Instructions to commissioners.

Annexed to the commission is an extract from the statutes of the State of New York, relative to the taking of testimony out of the State, which extract is directed by law to be annexed to the commission. But as it does not comprise everything necessary to be attended to by the commissioners, they are requested to observe the following more ample instructions.

I. All the commissioners named in the commission should have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified, or could not be notified, and the reasons for their not acting, be stated.

II. The commission must be executed by , the commissioner named therein.

III. The acting commissioner will examine the witnesses separately, after publicly administering to them the following oath or affirmation:

"You do swear that the answers which shall be given by you to the interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth. So help you God."

The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon and kissing the Gospels.

But if the witness shall desire it, he shall be permitted to swear in the following form:

"You do swear, in the presence of the ever living God;" and while so swearing he may or may not hold up his hand, in his discretion.

Or, if the witness shall declare that he has conscientious scruples against taking an oath, or swearing in any form, he shall be permitted to make his affirmation in the following form:

"You do solemnly, sincerely, and truly declare and affirm;" omitting the words, "So help you God."

IV. The general style or title of the depositions must be drawn up in the following manner:

Deposition of witnesses produced, sworn, (or affirmed,) and examined, the day of , in the year one thousand eight hundred and , at , under and by virtue of a commission issued out of the district court of the United States for the southern district of New York, in a certain cause therein depending and at issue, wherein Paul Sears et al. are libellants vs. The British Steamship Scotia, her engines, tackle, &c., The British and North American Royal Mail Steamship Company, claimants, as follows:

A. B., of [insert his place of residence and occupation,] aged years and upwards, being duly and publicly sworn, (or affirmed,) pursuant to the directions hereto annexed, and examined on the part of the , doth depose and say as follows:

First. To the first interrogatory he saith, &c.—[Insert the witness's answer.]

Second. To the second interrogatory he saith, &c.; and so on throughout.

If he cannot answer, let him say that he knoweth not.

V. If there be any cross-interrogatories, the witness will go on thus:

First. To the first cross-interrogatory he saith, &c.; and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting commissioner will certify as follows:

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this day of , 18 , before

Commissioner.

VII. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to, and be subscribed by the witness, and be endorsed by the acting commissioners, in this manner:

"At the execution of a commission for the examination of witnesses, wherein Paul Sears et al. are libellants vs. The British Steamship Scotia, her engines, tackle, &c., The British and North American Royal Mail Steamship Company, claimants, this paper writing was produced and shown to [insert the witness's name,] and by him deposed unto at the time of his examination, before

"*Commissioners.*"

VIII. The acting commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the commissioners will administer to him the following oath, and certify thereto:

"You do solemnly swear, that you will truly and faithfully interpret the oath and interrogatories to be administered to , a witness now to be examined, out of the English language into the language, and that you will truly and faithfully interpret the answers of the said thereto, out of the into the English language."

36 Let the depositions be subscribed by the interpreter as well as by witness, and certified by the acting commissioner, as follows:

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this day of , 18 , before

Commissioner.

X. The commissioner will make return on the back of the commission by endorsement, thus:

"The execution of this commission appears in certain schedules hereunto annexed.

"*Commissioners.*"

XI. The depositions and exhibits (if any,) must be annexed to the commission, and then the commission, the directions, the interrogatories, cross-interrogatories, depositions, and exhibits, must be folded into a packet and bound with tape. The acting commissioners are to set their

seal at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus:

U. S. district court, southern district of New York.

PAUL SEARS ET ALS.
vs.
THE BR. S. S. SCOTIA, HER TACKLE, &C.

To D. D. Lord, esquire, counsellor at law, No. 45 Exchange Place, New York City, U. S. A.

XII. When the commission is thus executed, made up and directed, it must be returned in the manner specified in the direction of the commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by one of the acting commissioners personally, or else be forwarded by some person coming to this place, and who must be liable, on his arrival, to make oath, before one of the judges or the clerk of the court:

"That he received the same from the hands of A. B., one of the commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting commissioners in the nearest post-office, he making the following endorsement thereon:

"Deposited in the post-office at , this day of , 18 , by me.

"*Commissioner.*"

In case of returning the commission by a vessel, it is to be deposited by one of the acting commissioners in the letter bag of such vessel, he making upon the commission the following endorsement:

"Deposited in the letter bag of the , now lying at , and bound for the port of New York, this day of , 18 , by me.

"*Commissioner.*"

The commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission.

If the commission be returned by an agent, let him be instructed to call, on his arrival at this place, upon D. D. Lord, esq., counsellor at law, No. 45 Exchange Place, New York City, U. S. A., who will receive said commission.

37 Interrogatories for the examination of William Curll, John O. Neal, Henry Hermann, Henry Vail, as witnesses in a suit depending in the United States district court, in an action by Paul Sears and others, libellants, against the steamship Scotia.

First. What is your age, residence, and present occupation; were you at any time employed on board the steamship Scotia? If yea, state when, and in what capacities you have been so employed.

Second. Were you on board of the Scotia at the time of her collision with the ship Berkshire, in 1867; were you on the deck of the steamship when the Berkshire's light first became visible; where were you stationed at this time, and for what purpose were you so stationed; were any persons other than yourself stationed in other parts of the ship on similar duty? If yea, give, if you can, the names of these persons, and the places where they were stationed.

Third. Did you hear the Berkshire's light reported; if so, was such report before or after you first saw it; did you hear any answer made to such report; if yea, by whom was it answered; did the Scotia have any lights set at this time; if yea, in what places, and how were they set? and say whether or not they were burning, and whether they were bright or dim.

Fourth. Did you see more than one light on the Berkshire; if yea, how many? If only one, state what its color was. How did it bear from your ship when first seen; did it change its bearings afterwards? If yea, describe the changes.

Fifth. Did you hear any orders given to the quartermasters at the wheel, or any orders to the engineers? If yea, state what these orders are, and when they were given, and how the Berkshire's light bore from your vessel when they were given.

Last. State any other fact or circumstance within your knowledge which relates in any way to the collision above inquired of.

Interrogatories and cross-interrogatories are hereby settled by consent, subject to all legal objections, except as to form.

January 17th, 1868.

SCUDDER & CARTER,
Proctors for Libellants.

Due and timely service of a copy of the within interrogatories is hereby admitted.

January 4th, 1868.

SCUDDER & CARTER,
Proctors for Libellants.

(Endorsed:) U. S. district court. Paul Sears et al. vs. The Steamship Scotia, &c. Interrogatories. D. D. Lord, proctor for claimants. To Messrs. Scudder & Carter.

Cross-interrogatories for the examination of William Curll, John O. Neal, Henry Hermann, and Henry Vail, as witnesses in a suit depending in the United States district court, in an action by Paul Sears and others, libellants, against The Steamship Scotia:

First. In what business or occupation are you now, and how have you been employed since the collision? State particularly what voyages you have made, in what vessels, and to what ports, and in what capacities.

Second. State the time of the day or night you came on deck, prior to the time you first saw or heard of any light in the watch on which the collision occurred. Was it your watch on deck at the time? State specially whether you first saw the light or heard a reference to it. If you state you saw it first, then state how it bore from your vessel when you so first saw it. State particularly its bearing, as to which side, quarter, or bow, you first saw it; off shore, much off shore—far.

38 If your attention was first called to the lights by any remark on your vessel, then state by what remark; what was the name of the man who made it, and at what place on the vessel was the man who made such remark. If your attention was called by a remark, you looked in consequence of such remark, then answer, as above requested, if you had seen at first.

State what was the next remark you heard in reference to the light; what was the name of the person who made it; where was he on the vessel; what light did you see. What was the next you saw or heard of the light; what was the next change you saw; how did the vessel bear after the first sight of her? State any change of the course of the vessel or light, from the time you first saw the vessel or light until the collision actually occurred.

Third. If you state any order or direction was given on your vessel, then state the name of the person who gave it. State particularly where you stood when any order or direction was given, who gave it, where that person or those persons stood. State the name of each, and how far from each you stood when the order or direction was given. Was any other order or direction given, other than you have testified to; if yea, what was it, who gave it, where was he?

Fourth. State each and every person that you saw on the deck of the Scotia from the time of the first report, and where you so saw them. Did you move from the place where you first saw the light? State any change you made, to what part of the vessel it was, and how far was each change. How far could you see a person to distinguish him at the time?

Fifth. Do you know of any matter or thing that may tend to the advantage of the libellants in this suit? If yea, state the same, fully and particularly.

Did you or either of you, sign any protest or statement in regard to the collision? If yea, state when and where you so made such statement. State particularly the city office in which, and person before whom, you made such statement. Was any protest made by the officers or owners of the Scotia; if yea, when and where was it made, and where is it now?

SCUDDER & CARTER,
Proctors for Libellants.

Settled by consent, subject to all legal objections, except as to form. January 17, 1868.

D. D. LORD,
Proctor for Claimants.

Deposition of witnesses produced, sworn, and examined the twenty-second day of February, the twenty-seventh day of February, and the nineteenth day of March, in the year one thousand eight hundred and sixty-eight, respectively, at Liverpool, in England, under and by virtue of a commission issued out of the district court of the United States for the southern district of New York, in a certain cause therein depending and at issue, wherein Paul Sears et al. are libellants vs. The British Steamship "Scotia," her engines, tackle, &c., The British and North American Mail Steamship Company, claimants.

WILLIAM CURLL, of number 10 Birch street, in Liverpool, in England, able seaman, aged twenty-seven years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the claimants, doth depose and say as follows:

First. To the first interrogatory he saith: My age is twenty-seven; my residence is No. 10 Birch street, Liverpool; my occupation is that of an able seaman. I was employed as able seaman on board the steamship "Scotia," on the voyage in which she came into collision with the "Berkshire;" I am still on board the "Scotia." I have been in the service of the company three years, off and on, in different ships, always as an able seaman.

Second. To the second interrogatory he saith: I was on board
39 the "Scotia" at the time of her collision with the "Berkshire," in the year 1867. I was on the port paddle-box of the "Scotia" when the "Berkshire's" light first became visible; I was stationed there on the look-out; there were six other lookouts besides myself stationed on the various parts of the ship; I think I can give all the names except one. They were Charles Dunning and Henry Hermann, on the forecastle; William Coombs, on the crank-hatch; John O'Neil, on the starboard paddle-box; myself on the port paddle-box; —— Griffiths, by the after funnel, and another man by the fore funnel. They were all on the look-out.

Third. To the third interrogatory, he saith: I did not hear the "Berkshire's" light reported by any one except myself. I heard an answer to my report from the chief officer. The "Scotia" had her admiralty regulation lights set at this time. There was a bright, white light at the foremast head; a red light on the port paddle-box, and a green light on the starboard paddle-box. They were all burning brightly during the whole of the time that I was on the paddle-box.

Fourth. To the fourth interrogatory, he saith: I did not see more than one light on board the "Berkshire," which was a white light, and bore about two points on our port bow at the time when I first saw it. It changed its bearings in coming, as it at first drew farther aft. We saw no side lights, and could not make out where the light was placed on board the "Berkshire." When she came nearer, I saw she was a sailing vessel; and as she was approaching, her helm apparently must have been put hard astarboard, as she closed in rapidly on the "Scotia," and ran into that vessel, striking us with her stem and starboard bow on the bluff of the Scotia's port bow.

Fifth. To the fifth interrogatory, he saith: I did hear orders given to the quartermasters at our wheel, and also orders to the engineers. The orders to the quartermasters were first "Port!" and afterwards "Hard aport!" The first order to port was given shortly after I reported the light, and after our mate had taken a good look at it through his glass, and the light then bore about two points on our port bow. The order, hard aport, followed closely afterwards. I cannot now say exactly how the light then bore, as I did not take particular notice. The order that I heard given to the engineer was to stop the vessel, and afterwards I heard an order to "turn back." These orders, I believe, *was* given by the man at the crank hatch, and were given about five or six minutes before the "Berkshire" struck us. When this order to stop was given, the "Berkshire" bore a little forward of our port paddle-box, and was closing in fast.

To the last interrogatory, he saith: I know of no other fact or circumstance relating to the collision, except that I had a conversation with a seaman of the "Berkshire," who told me that he was at the wheel of that vessel, and that the helm had been at first ported, but that when the captain came on deck he had ordered it to be put, and it was put, hard astarboard. (Not read.)

To the first cross-interrogatory, he saith: I am an able seaman. Since

the collision I have been employed as able seaman, and have made four voyages to New York in the "Scotia," and three voyages in the Douro to Lisbon and Oporto.

Second. To the second cross-interrogatory, he saith: I came on deck at midnight. My watch on deck commences at that hour. I do not think that I was the first on board of our vessel that saw the light, but I do not remember that I heard any reference to it by any of the other lookouts. The light bore about two points off our port bow. I have already stated that I do not remember that I heard any remark which drew my attention to the light by any person on board our ship. The only remark I remember was, when I reported the light to the mate, he answered "All right!" He was then forward of the fore funnel, on the saloon deck. The light I saw was a white light. I never lost sight of the light until the collision. The "Berkshire" was very close to when I made out her hull. The course of the vessel was changed several points from the time I first saw the light. She altered her course many points.

Third. To the third cross-interrogatory, he saith: The mate gave the orders to "port" and "hard aport." His name is Sowerby. I was standing on the port paddle-box when these orders were given. I never left my station until after the collision. The mate was standing forward of the fore funnel, and was about thirty yards distant from me. I heard no other orders except those I have testified to.

Fourth. To the fourth cross-interrogatory, he saith: After I went on the look-out on the paddle-box I paid no attention to the persons on the deck, as I attended solely to my look out; and in the night-time, although you could see persons moving about, you could not tell who they are on a large ship like the "Scotia." I could see the mate, and also the man on the starboard paddle-box, and also a man at the crank hatch. I never moved from the paddle-box. I could tell a man at a distance of thirty or forty yards, but not much more.

Fifth. To the fifth cross-interrogatory, he saith: I know nothing that will tell to the advantage of the libellants in this suit. I do not remember that I signed any protest in regard to the collision, but I made a statement at the office of Mr. Lord, the attorney for the owners of the "Scotia." I do not know that any protest was made by the officers or owners of the "Scotia."

WILLIAM CURLL.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this twenty-second day of February, 1868, before me.

WILLIAM G. BATESON,
Commissioner.

JOHN O'NEAL, of 131 Buckingham street, in Liverpool, in England, able seaman, aged twenty-five years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the claimants, doth depose and say as follows:

First. To the first interrogatory, he saith: My age is twenty-five; my residence is No. 131 Buckingham street, Liverpool; my occupation is that of an able seaman. I was employed as an able seaman on board the steamship "Scotia" on the voyage in which she came into collision with the "Berkshire."

Second. To the second interrogatory, he saith: I was on board the "Scotia" at the time of her collision with the "Berkshire," in the year 1867. I was on the starboard paddle-box when the Berkshire's light

was first seen; I was stationed there on the look-out. There were six other lookouts besides myself stationed in various parts of the ship. I remember the names of only three of the number, namely, William Curll, William Coombs, and Henry Breen. William Curll was stationed on the port paddle-box. I cannot now recollect where the other two I have named were stationed; they were all on the look-out.

Third. To the third interrogatory, he saith: I heard the Berkshire's light reported from the forecastle; I did not see it until it was reported. I heard the chief officer answer on the report being made. The "Scotia" had her admiralty regulation lights set at this time. There was a bright white light at the foremast head, a red light on the port paddle-box, and a green light on the starboard paddle-box. They were all burning brightly during the whole of the time that I was on the paddle-box.

Fourth. To the fourth interrogatory, he saith: I did not see more than one light on board the Berkshire, which was a bright light, and bore one to two points on our port bow at the time when I first saw it. I cannot recollect whether it changed its bearings or not. I saw no side-lights, and could not make out where the bright light was placed on board the Berkshire. When she came nearer I saw that she was a sailing vessel, and, as she was closing upon us rapidly, I judged that she had starboarded; she ran into us, striking us with her stem on the bluff of the Scotia's port bow.

Fifth. To the fifth interrogatory, he saith: I did hear orders given to the quartermasters, and also orders to the engineers. The orders to the quartermasters were first "Port!" and afterwards "Hard aport!" The first order to port was given about ten minutes after the light was first reported. I cannot now recollect whether the bearing of the light changed after the order to port was given. Immediately after the order to port was given, I heard the order hard aport. The order I heard given to the engineer was to stop. I did not hear an order to turn back. The order to the engineer was given by the mate, and was passed to the engineer by a man who was stationed at the crank hatch. This order was given about five minutes before the Berkshire struck us. When this order, "Stop!" was given, the Berkshire was a little forward of our port paddle-box, and was closing on the Scotia rapidly.

Last. To the last interrogatory, he saith: I do not know of any other fact or circumstance which relates in any way to the collision.

41 First. To the first cross-interrogatory, he saith: I am an able seaman. Since the collision I made only one voyage in the Scotia, and then left the employ of her owners. I have since been employed in the steamers "Belgian" and "Moravian," trading between Liverpool and Quebec and Montreal.

Second. To the second cross-interrogatory, he saith: I came on deck at midnight. My watch on deck commenced at that hour. I was not the first to see the light. I did not see it until after it was reported. The light bore about two points off our port bow. The only remark I remember hearing when the light was reported was by the mate, who said, "All right!" He was then near the fore funnel on the saloon deck. The light I saw was a white light. I never lost sight of the light until the collision. The Berkshire was very close to when I made out her hull. I cannot say whether she altered her course from the time I first saw her light, but she appeared to me to starboard her helm.

Third. To the third cross-interrogatory, he saith: The mate gave the orders to port. I do not know his name. I was standing on the starboard paddle-box when these orders were given. When the light was

first reported I left my station on the paddle-box and walked amidships of the paddle-box bridge, in order to have a better look at the light, as our fore trysail was set, and I had then the light well clear of the sail. After looking at the light a moment, I went back to the starboard paddle-box, from whence I could still see the light. When the mate ordered the helm aport, I again went amidships of the bridge, and after looking at the light I again went back to the starboard paddle-box, and did not leave that post until the vessels were in the act of collision. The mate was standing by the fore funnel, some yards distant; I cannot say how many from me. I heard no other orders except those I have testified to.

Fourth. To the fourth cross-interrogatory, he saith: After I went on the look-out I paid no attention to the persons on deck, as I attended only to my look-out. I saw numbers of persons moving about the deck, but could not tell who they all were. I could see the mate, and also the man on the port paddle-box. I could see the man at the crank hatch. I moved only from my station as I have before described, a distance of about thirty feet.

Fifth. To the fifth cross-interrogatory, he saith: I know nothing that will tell to the advantage of the libellants in this suit. I did not sign any protest in regard to the collision, but I made a statement at the office of Mr. Lord, the attorney for the owners of the "Scotia." I do not know that any protest was made by the officers or owners of the "Scotia."

JOHN O'NEIL.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this twenty-seventh day of February, 1868, before me,

WILLIAM G. BATESON,
Commissioner.

WILLIAM BREEN, of number 16 Walmsley street, in Liverpool, able seaman, aged 24 years and upwards, being duly and publicly sworn, pursuant to the directions hereunto annexed, and examined on the part of the claimants, doth depose and say as follows:

First. To the first interrogatory, he saith: My age is twenty-four and upwards. My residence is Walmsley street, in Liverpool. My occupation is that of an able seaman. I have been employed on board the steamship "Scotia." I was on board of her when the collision took place with the "Berkshire," as an able seaman. That voyage was my third trip as able seaman in the "Scotia."

Second. To the second interrogatory, he saith: I was on board the Scotia at the time of her collision with the "Berkshire," in 1867. When the Berkshire's light was first reported I was stationed on the deck at the forward part of the fore funnel, as one of the look-outs, and for the purpose of striking the bell and blowing the steam-whistle in case of need. There were seven hands altogether, including myself, on the look-out. I cannot now remember all the names of the look-outs. A man named Curll was on the port paddle-box, and Coombs was at the crank hatch. Two were on the forecastle. There was a man on the starboard paddle-box, and a man named Griffiths was by the after funnel. Those were all that are termed the lookouts. The deck was in charge of Mr. Sowerby, the chief officer.

Third. To the third interrogatory, he saith: I heard the Berkshire's light reported before I saw it myself. The report was answered by the

chief officer. The "Scotia" had her lights set at this time. They
42 were a bright light at the masthead, a red light on the port paddle-box, and a green light on the starboard paddle box. All the lights were fitted according to the admiralty regulations, and were most excellent lights, and burned brightly.

Fourth. To the fourth interrogatory, he saith: I only saw one light on the Berkshire, which was a bright light. It bore about one and a half points on our port bow when I first saw it. At first the light opened a little by drawing further aft, but afterwards it suddenly closed in upon us, until the vessel herself ran into our steamer, and she struck us with her stem near the port cathead of the "Scotia," the Berkshire herself being apparently under hard-astarboard helm.

Fifth. To the fifth interrogatory, he saith: I heard our chief officer pass an order to the quartermasters at the wheel to port. I do not now remember that I heard any order to the engineer. The order to the quartermasters was to port, and afterwards hard aport. The order to port was given a few minutes after the light was first reported, and after the mate had gone forward to look at it through his glasses. I think when the order to port was given the Berkshire's light must have been rather over two points off our port bow, and the light was approaching us quickly at the time when the order to hard aport was given, as if she had in the interval starboarded her helm.

Last. To the last interrogatory, he saith: The "Berkshire" carried no colored side lights. I know of no other fact or circumstance relating to the collision.

First. To the first cross-interrogatory, he saith: My present occupation is that of an able seaman. Ever since the collision I have been employed as an able seaman on board the Cunard steamers, always between Liverpool and the United States.

Second. To the second cross-interrogatory, he saith: I came on deck at midnight. It was my watch on deck at that time. I did not see the light until after it was reported by the lookout on the forecastle. When I first saw the light it was, as near as I can judge, bearing about a point and a half off our port bow. The vessels were many hundred miles off shore. I do not know which of the men on the forecastle it was that reported the light, nor do I know his name. I do not now remember that I heard any other remark in reference to the light, but I remember hearing some one say that the mate had ordered the rockets to be got ready for signalling, and I saw the man go for them. The only light on board the other vessel that I saw was a bright light. When my attention was once drawn to the light, I watched it until the time of the collision. The only change that I saw in the light was, that at first it drew further aft, and I expected the vessels would go clear, when afterwards it suddenly closed in upon us. We could not see the vessel herself or her canvas until she was close into us, and then she bore as if she would run right into our stem. The "Berkshire" must have altered her course several points at the time when the collision actually occurred.

Third. To the third cross-interrogatory, he saith: The orders to "port" and "hard aport," given on board of our vessel, were given by Mr. Sowerby, who was the chief officer. I stood all the time from the time when the light was first reported until the collision just forward of the fore funnel. The mate, when he gave both orders, was standing close by me on the saloon deck, and about five or six yards from me.

Fourth. To the fourth cross-interrogatory, he said: From the place where I stood I could see the two men on either paddle-box, who were

a little abaft of me, and I could also see the men on the forecastle. Curll was the name of the man on the port paddle-box. O'Neil was on the starboard paddle-box. Dunning was the name of one of the look-outs. I forget the name of the other. Those four were the only men that I can remember taking notice of, excepting the mate and Mr. Nelson, the extra second mate, who was forward of the foremast. I did not move from my station at the time; it was very dark, and I could not see the entire length of the ship to distinguish a man by name, although you might see figures moving about. I do not know anything in favor of the libellants. I did not sign any protest in regard to the collision, but I made a statement before a lawyer in New York. I believe it was before a gentleman named Mr. Lord, the attorney of the owners of our steamer. I do not know that any protest was made by the officers.

HENRY BREEN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this nineteenth day of March, 1868, before—

WILLIAM G. BATESON,
Commissioner.

(Endorsed:) U. S. district court, southern district of New York. Paul Sears et al. vs. The Br. S. S. Scotia, her tackle, &c.

43 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to the act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Thomas Cunningham, to testify and the truth to say, on the part and behalf of the claimants, in a certain suit or matter of controversy, now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants, against the Steamship Scotia, her tackle, &c.

And the said Thomas Cunningham being about the age of twenty eight years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Thomas Cunningham, and he did thereupon depose, testify, and say as follows, viz:

I reside at No. 3 James Slip when in New York, but my home is in Liverpool, England. I am a mariner, and expect to go to sea as soon as I can get a chance. I was at the wheel of the ship Berkshire at the time of her collision with the steamship Scotia, on the Scotia's last

voyage to New York. The Berkshire was bound to Havre, from New Orleans. We left New Orleans March 6th. We were run into Thursday morning, about a quarter to two o'clock. My trick at the wheel began at twelve o'clock. I was in the mate's watch. We had five men and the carpenter in that watch. I heard the Scotia's light reported about twenty-five or thirty minutes before the collision. We were then heading S. E. by E. ½ E. steering that course. The wind was about S. W. and by W., as near as I could judge. I had held that course from the time I went to the wheel until such time as the mate gave me the order to luff. She was going about a point and a half free, starboard tacks aboard. We had set inner jib and outer jib, and topmast staysail, fore-topsail, foresail, main topmast-staysail, mainsail, main-topsail, main topgallant-sail, mizzen topsail; that is all. I forget whether she had her spanker set or not. We were going about eight or nine knots. I saw the Scotia's lights after they were reported; as soon as I brought the ship up in the wind and made the sail shake. About a minute or two after the lights were reported the mate gave me orders to luff. I did luff; came around as far as to head S. E. Sails were shaking at the time. I did not see the lights until after the sails shook. The lights then bore about three points (may be more) off our lee bow; that was our port bow. I saw a red light and a mast-head light, which was a bright light. Our captain was in bed when the lights were first reported. He got out on deck on hearing the mate shout to the men forward. Captain, when he got on deck, told me to keep my luff. Afterwards, he gave me the order "Hard-up." Hard-up was hard astarboard. I did put the helm astarboard, and the mate assisted me in doing so. The vessel changed her direction, and went off before the wind. I kept the helm hard-up till such time as she was struck. We were heading N. N. E. at the time we were struck. The Scotia struck the end of her bowsprit, slanting on our weather foretopsail brace. The blow gave me a bit of a jerk; not much. The Scotia's sponsons knocked away our taffrail, as she came alongside of us. I did not get on board the steamer; I stopped on the Berkshire. She keeled over to port after the collision. Every roll she gave she went over further to port. The Scotia struck the starboard side of the Berkshire; the port side of the Scotia did. We had our bright light on the Berkshire fastened on the anchor-stock on the starboard bow, alongside the cathead, ten or twelve feet from the bowsprit. We had carried colored lights during that voyage. We had given up carrying them about a week or more before the collision. The lamp that was in this lantern, on the anchor-stock, was the one we used to burn in the forecastle. After this was taken away, we burned in the forecastle one of the lamps, I believe, that had belonged to the green light. The colored lanterns had been put away in the cabin. There were shades in our rigging to put those lanterns on; one each side of the mizzen rigging.

44 Q. What kind of vessel was the Berkshire, as to soundness?

A. She was leaky. In bad weather we would pump her nearly all the watch, unless work called us away from it. Men had been working at the pumps after twelve o'clock that night; four men. I don't know whether they made the pumps suck before the collision; I believe they were pumping up to the time the light was reported. Some of her spars were rotten; jib-boom was sprung; cross-jack yard was rotten. We kept our luff six or eight minutes before putting our helm astarboard. We put our helm astarboard about ten or twelve minutes before the collision took place.

Cross-examined by Mr. Carter:

I shipped in New Orleans. Have followed the sea 14 years, before the mast all of the time, except 2d mate of a vessel in the China Sea. We had the wind free a point and a half, that was before the beam—before we made any change in our course. Man on the look-out reported the light. He sang out, "A light off the lee bow." I didn't hear him say how far off. The mate was standing on the fore part of the poop. He told me to luff, to put my helm down, as soon as the light was reported. It took a couple of minutes to come into the wind. The trim of our sails was not altered at all. Kept her shaking till the captain came on deck—six or eight minutes. I kept the light in view on the lee bow after I first saw it. When I got the order from the captain to starboard our helm, the light was nearly four points on our lee bow. The ship had not lost her headway when we starboarded. At the moment I put the helm to starboard she was going 8 or 9 knots. We didn't come round further than S. E. when we luffed. I know this, because I looked in the compass. The last time I looked in the compass was just as she was struck—just as the steamer was coming on to us. As we bore away, we did not alter the trim of our sails any. The braces never were touched till after she was struck. She was caught by the lee after she was struck. I did not see the light when it was put into lantern, but I saw the lantern fastened to the anchor stock. I believe there was a lantern put over the side before the vessel struck. I don't know the color of it. That was after I starboarded—after I brought the steamer's light over her starboard bow. I did not see the steamer's green light at any time. We had middling rough weather on that voyage before the collision. We had carried the cross-jacks. When I first saw the light it was 2½ to 3 points off our lee bow. I got on the steamer after the collision by our boat. All hands left the ship finally. Steamer's boat helped take them off. I believe one of the men threw the Berkshire's green lantern overboard out of one of the boats, as they were getting on the steamer. It was in one of the boats. The boat took some water, and was very near swamping; that was the smallest boat of the two belonging to the ship—the one I was in. We arrived in New York some time last week in the Scotia; landed over in Jersey; came to New York from there. Went to a friend of mine, No. 3 James Slip, Patrick Gillespie. I told him about this collision. I don't know as I spoke to anybody before him about it after I left the Scotia. I haven't talked with anybody about it since. I have given a statement of it to the captain of the Scotia; not to any one since I talked with Gillespie before I came here. I was brought here by some gentlemen from Cunard's office. I came from Cunard's office here. I first went to Cunard's office the same day I landed, or the second day after. I haven't been there every day since, only to-day; no other time. They sent for me to come up here. I didn't talk to no persons when I first went to Cunard's office. I went there to give a statement of how it happened. I gave that statement to a gentleman there, who took it down. I don't know his name.

Re-direct:

When that lantern was thrown away it had no light in it. The first I saw of the green lantern it was in the boat. I saw the captain put a lantern over the side. It had a light in, but the lantern broke—the glass of it—in taking it in, and the light then went out. I don't know what lamp was put into it. Captain had it in his hands 3 or 4 minutes. He

took it inside again, when it broke. I don't know how it came to break, but I think in taking it in over the side it slipped and struck the rail.

Re-cross:

It was not very long before the collision that the captain put that lantern over the side. He hadn't time to get another light before the ship was struck.

45 Q. State, in minutes, how long before the collision he first put it over the side.

A. I don't think it could be over a minute.

THOMAS CUNNINGHAM.

Sworn to before me this 30th day of April, 1867.

GEORGE F. BETTS,
U. S. Com'r.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et als. vs. Steamship Scotia. Deposition of Thomas Cunningham. Filed May 3d, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States.'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Thomas Riley, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy, now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants against the steamship Scotia, her tackle, &c.

And the said Thomas Riley, being about the age of thirty-nine years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Thomas Riley, and he did thereupon depose, testify, and say as follows, viz:

I reside in New York City when at home. I am a seafaring man. I expect to go to sea as soon as I can get a chance. I was on the Berkshire at the time of her collision with the Scotia. I think it was on the 6th of April, if I am not mistaken. I was on the look-out, standing on the topgallant forecastle. I first reported the Scotia's light; I was walking to and fro athwart the ship. I first saw the bright light; it bore about a point or a point and a half off our port bow. I reported it to the officer of the deck as about a point off our port bow. It was a

bright light that I first saw and reported. I afterwards (10 or 15 minutes after) made out a red light and reported it. The steamer was very near abeam when I reported the red light. After I reported the bright light I heard the mate tell the man at the wheel to keep his luff as close as he could go. She was kept close to the wind until just after the captain came on deck. I heard him sing out to Cunningham, who was at the wheel, "Hard up." The ship then paid off right across the steamer's bows. We sung out to the steamer to put her helm aport. All of our crew, except me, sung out. Then the steamer ported her helm, and stopped just before she got alongside of us. I saw her wheels stopped. Then the ships fell together. The first thing that touched was the steamer's jib-boom catching against our braces, and the first part of the hull that touched was the steamer's sponsons came against our hull. I should judge the vessels were together three to five minutes.

Q. Did the blow start you from your feet?

A. I can't say that I felt her hitting us; just as she was hitting us I ran along the lee side. At the time we came together we had our starboard tacks aboard, braced in about three or four points. When the two ships came together our sails were not drawing, but were by the lee. After the two vessels got apart the Berkshire fell over to port. When I left the wheel, at eight that evening, our course was S. E., and by E. ½ E. How she headed when I first reported the light I can't say, but I think, to the best of my knowledge, that was the course she was steering. The wind, I think, was S. S. W., as near as I could give it. The Berkshire had a bright light on the anchor-stock; that was the only light she had shown. She had colored lanterns aboard, but we hadn't used them since we reached the latitude of about New York, eight or ten days before the collision. We had one of the lamps of the side lanterns (the green one, I believe,) burning in the forecastle as a forecastle lamp. We left that lamp burning there when we left the ship. I lit it myself after the collision. No green light was shown before the collision to my knowledge; there might have been, but I saw none. I saw the green light in Wilson's bag after I got on the steamer; it had no lamp in it. I told him to chuck it overboard, and he did.

46 Q. If the Berkshire had kept her luff, would any collision have happened?

A. No, sir; couldn't have happened; not the way the steamer was steering and us, because that fetched her so near abeam that I know that she wouldn't have run up to windward and hit us.

Q. What was the collision owing to?

(Objected to.)

A. It was owing to neglect—carelessness—on our ship.

Q. What did your ship do that was careless?

(Objected to.)

A. First place, we had no side lights out; next place, we were running with a bright light—steamboat's lantern—which is not allowed in a sailing vessel by the laws of any nation. We got the steamer bearing about four points off our port bow, and, I should say, between one and two miles off; then we hard-up, and ran down to her; ran right across her bows. That is what I call carelessness.

Q. What sort of a vessel was the Berkshire as to soundness?

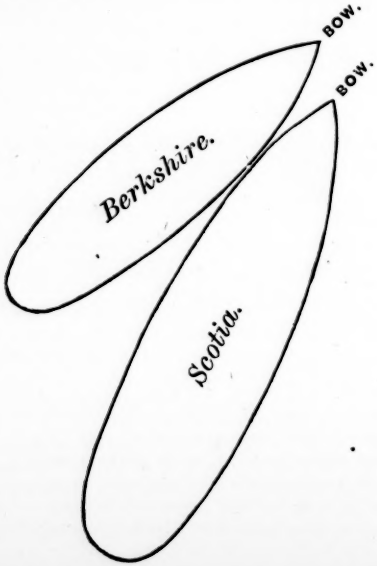
A. She was rotten right through the piece. If we laid over for an hour we had a half hour's pumping. It wasn't safe for a man to go up above her shear pole, or to go on her yards at all. All her yards were completely rotten.

Cross-examined by Mr. Carter:

We had a pretty rough kind of a passage—moderate gales—but nothing to heave the ship to; moderate weather; reefing topsails now and then. That night we had a seven or eight-knot breeze, and were going along a nice jog. We had every sail on her that would draw. If I was going before God Almighty to-morrow, it was our fault—our carelessness. We had nothing reefed at the time of the collision. We had not carried away anything on the voyage. I could stick my foot down between the top-gallant forecastle and the ship's side. When she would lift in the sea, the water would spout out of her weather side—out of the seams—like out of a watering-pot. I know that was owing to rottenness. I observed her water-ways to be rotten. I never bored her any where. The reason her yards were not carried away was, that we had no bad weather. By luffing, we brought the light nearly abeam, by keeping our luff. We luffed enough to shiver our canvas. I heard the mate say, "Keep your luff," and I heard the captain say, "Hard-up your wheel." "Keep your luff" was the first order I heard after I reported the light. That does not mean that she has luffed already, but to luff her as high as she will go. Before we luffed the wind was forward of our beam. I can't say how long before the collision the captain came on deck, for I was on the look-out. I should judge it was seven to eight or ten minutes before the collision that I heard the captain give the order, "Hard-up." I should say it was ten minutes, any how. I can't say how we were heading then, for I was on the look-out. The sails were shaking at that time, and the steamer was then nearly abeam—on our port bow. I couldn't judge how far off. I couldn't say how far off without telling a lie.

Q. Have you any idea how far off?

A. I have an idea. I should judge she was close on to a mile off. At that time I could see her hull; all plain. I reported her some time before that—"A steamer running."



47 This represents my idea of the way the two ships first touched when they came together. The topgallant forecastle of the Berkshire was damaged. Other points of her were damaged. The whole side was torn out of her. The chain plates were torn out, which caused the foremast to go over the side, because the iron work was all rotten—all rusted off. The sides were broken in when we abandoned her under the quarter and abreast of the fore rigging. I could see her cargo in the between decks through the side, only in one place abreast of the fore rigging. After the foremast went, that took five or six planks out of her. She brought up by the lee just about the time we struck. I can't say that it was before, because I started to run aft just about the time we were going to hit. I talked a little with the captain of the Scotia after I got aboard. He asked me, "Riley, did'nt you see the green light?" I thought you asked about my talking with the captain of the Berkshire. I did talk with the captain of the Scotia. He had me aft. I made an affidavit then, and one in Cunard's office the day after I landed. I told Wilson to chuck the lantern overboard because it was of no account—a tin shell of a thing, not worth much. I didn't tell Wilson to chuck anything else overboard. That was a green lantern. Wilson was a sailor on board. Mr. Cunard has paid our board since we have been ashore. No other expenses have been paid. I went ashore right after the Scotia arrived. The steamer was stopped; her paddles were stopped when we came together. I saw the paddles in motion before she came and afterwards. Her paddles were stopped just before we came together. Steamer's headway was not stopped when we came together. She was about a length off, I judge, when her paddles stopped. I didn't see her paddles in motion again after that before the collision. I would have seen them in motion if they had been. I couldn't help it, I was so close.

Re-direct:

It was just before they came together that I ran aft.

THOMAS RILEY.

Sworn to before me this 30th day of April, 1867.

GEO. F. BETTS,
U. S. Commissioner.

The further examination of witnesses in this case is adjourned, by consent, to the 1st day of May, 1867, at 2 o'clock p. m., at the same place.

GEORGE F. BETTS,
U. S. Commissioner.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. Steamship Scotia. Deposition of Thomas Riley.
Filed May 3d, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this first day of May, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more conven-

ient taking of affidavits and bail in civil causes depending in the courts of the United States, passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, James Wilson to testify and the truth to say, on the part and behalf of the claimants, in a certain suit or matter of controversy, now depending and undetermined, in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants, against the steamship Scotia, her tackle, &c.

And the said James Wilson, being about the age of twenty-six
48 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said James Wilson, and he did thereupon depose, testify, and say as follows, viz:

I live in Liverpool, England; am a sailor; expect to go to sea as soon as I get a ship. I was on the Berkshire at the time of this collision; in the mate's watch. That watch turned out at twelve o'clock. We pumped ship the first thing we did; pumped twenty minutes, till the light was reported on the lee bow. I then left the pump, which had sucked, and walked over to the lee side. The light bore, to the best of my knowledge, about a point on our lee bow. I saw a red light and a bright light, I supposed, on the mast head. I partly thought it was a steamer coming to the westward. I didn't know at first what it was; did not take much notice, for I ran back to the weather side to pump again. I remember the mate giving an order to luff. She luffed enough to shake all her sails. The foretopsail, I think, was pretty near aback. When we had luffed, the steamer's lights bore about three points on the port bow, which brought them a little abaft the lee clew of the foresail. I was then standing at the pump, looking at the light. The pump was abaft the mainmast, and I was looking between the mainmast and the forward house. I saw the captain come on deck. I didn't hear him give any order to the man at the wheel. I heard either him or the mate order a man to go to the lee wheel. I heard an order given to put the wheel up, but which gave it I could not tell; either the captain or the mate gave it. I couldn't see the wheel, but the ship paid off, and was taken aback on the other side. Then the steamer struck us. I think the speed of the steamer was stopped before she struck us. I think it was an hour after we saw the light on the port bow before the collision. I think it was about six or seven minutes after the ship paid off before the steamer struck us. It throwed me from the main rigging down against the pump—main rigging on starboard side; pump is amidships abaft the mainmast. We had a bright light on the starboard anchor stock. We had no colored light at all. I went into the cabin after the collision; I took the port lantern from the cabin; that was the red light. I took it aboard the steamer, and threw it overboard. It was about seven or eight days since we had shown colored lights. The lamp belonging to the red light we had burning in the forecastle, and we got the lamp out of the forecastle that was in the bright light on the anchor stock. I had the wheel from six to eight that night; then I steered S. E. by E. ½ E. The ship was rotten; not fit for a man to go to sea in. If she got over two streaks, and let her stand there an hour, we had a

half hour's pumping. She sucked twice before the collision. There was a heavy sea, and she was rolling. Our jib-boom was sprung about eighteen inches outside the cap. Cross-jack yard was rotten. We were going between eight and nine knots an hour. I came to New York in the Scotia. I made no statement except in Mr. Cunard's office. My board is paid in Cunard's office. Capt. of the Scotia gave me four sovereigns when I came ashore. I have got about $15 of the boarding-master.

(Objected to.)

Cross-examined by Mr. Carter:

I was standing about seven feet from the mainmast when I saw the light under the lee clew of the foresail. I was standing on the weather side of the mainmast. The ship laid about twenty to thirty minutes with her sails shaking, to the best of my knowledge. I did keep the light in view all the time. I called the starboard watch; told them there was a steamer coming down on us. At that time could see the white water from her paddles. That was before the order was given to hard-up. I think the steamer was then about a half a mile off from us. The night was pretty cloudy; no moon; the stars were shining, not bright, but once in a while could see them. I couldn't tell how fast the steamer was going when she struck us; but the men on the steamer, when I got there, said she was going 13¼.

(Objected to.)

The steamer's crew, I mean. She seemed to me to approach pretty fast; she struck us at the after part of the fore rigging; her stem hit us there, right stem on as we were paying off. Her speed was stopped by her sheering us around, and I tried to get aboard of her. Two of our men jumped aboard of her, and I had hold of our weather brace, intending to jump aboard the steamer, but concluded not to try it. We brought up by the lee, so that our sails were aback before the steamer struck us. I took my bag aboard the steamer with me; I took it out of the forecastle; I had 2 shirts in it, a pair of oil-skin trowsers, and a monkey-jacket. Everything was scattered about the forecastle, and I grabbed what I could, put it in my bag, and threw it in the boat.

49 After we got out of the forecastle I went aft to try to get a boat out. There was no blocks nor ropes to be found; couldn't find the 2d officer nowhere. We tried to get the starboard boat out. I threw my bag into it. I went into the cabin after the boat got clear; then the boat came back. My bag was lying in the grating opposite the cabin door.

Q. How happened you to take that lantern?

A. I thought most likely the steamer was going to leave us, and if we got adrift in the boat the lantern would come in handy for us. I saw there was no light in it then. We got aboard the steamer about half-past two, and about daylight I threw it overboard. Nobody told me to throw it overboard. I don't suppose anybody knew I had it except Nelson and Riley. I don't know as anybody saw me throw it over. It was about 6 o'clock, a. m., I threw it over. I threw it over because I did not want it in my bag; thought it was too much nuisance to have there.

Re-direct:

The steamer had stopped her headway when she struck us. I saw white water in front of her paddles. I expected to jump from between our fore and main rigging on to the forward part of the sponsons of the steamer.

Re-cross:

I can't tell how much the steamer had stopped her headway.

Re-direct:

When I expected to jump, the steamer's sponsons were near our side —close alongside. The steamer was alongside a minute. Her sponson knocked our starboard quarter out as she was going ahead. She ran ahead about a mile, and stopped there for us, and sent two boats for us.

his
JAMES + WILSON.
mark.

Sworn to before me this 1st day of May, A. D. 1867,

GEO. F. BETTS,
U. S. Commissioner.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Steamship Scotia. Deposition of James Wilson. Filed May 3, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Be it remembered that on this first day of May, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the state aforesaid, Martin Neilson, to testify and the truth to say, on the part and behalf of the claimants, in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York at New York, wherein Paul Sears and others are libellants, against the steamship Scotia, her tackle, &c.

And the said Martin Neilson, being about the age of 20 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Martin Neilson, and he did thereupon depose, testify and say as follows, viz:

I live in Norway; am a sailor. I expect to go to sea when I
50 get a chance. I was in the Berkshire at the time of her late collision with the Scotia. I was able seaman on her. I was on deck at the time of the collision—in the mate's watch; that watch came on deck at 12 o'clock. The first work we were set to on coming on deck was to the pumps. Kept pumping about an hour. All the watch were there except a man on the look-out and one at the wheel; heard a light reported. The man on the look-out sung out there was a light on the lee bow. The mate said, "luff her up." She luffed up till she was all aback. She kept her luff about ten minutes. Then the mate sung out, "Hard-up;" I think it was the mate. The captain was on deck at the

time. Her helm was put up. The Scotia struck us just in that time while the helm was hard-up. The ship did not get around before she was struck. We had a white light on the starboard anchor-stock. We had other lights aboard, but they were not out. I did not see any green lantern out from our side that night. I saw the steamer—a white light and a red light. When we were luffed up we got the steamer's light just on the lee clew of the foresail. I was standing just by the pump, by the mainmast on the starboard side; that pump was about amidships. I did'nt stay there till the steamer struck us. After we bore away, all of us left the pump and went and shouted, "Steamer, ahoy." The steamer was then so that I could see her hull. Can't say how far off. I got into a small boat that belonged to our ship, and so got on to the Scotia, and came here in the Scotia. I know the captain of the steamer, but not his name.

Q. Did you make a statement to him?

(Objected to.)

A. No; I did not.

Q. Did you make a statement to me, (Mr. Lord, counsel for the Scotia?)

(Objected to.)

A. I don't know what you mean.

Q. Did you tell me how the collision happened after you got here?

(Objected to.)

A. Yes, sir. I am boarding at John Manning's.

Q. Who is paying your board there?

(Objected to.)

A. They pay it from the office I came from; that is, Mr. Cunard's.

Q. What kind of ship was this?

A. An old box. She leaked much; pumped day and night.

Cross-examined by Mr. Carter:

I did'nt know how the wind was that night. I saw the light when it was reported. It was on the port bow—about four points on the port bow. It did not get any further abeam. The braces were not touched at all at any time after the light was reported, before the collision. It was about a quarter of an hour before the collision that the light was reported. The steamship struck us aft side of the fore chains, about by the topgallant back-stays. Her stem struck us—took the whole side off of us, bulwark and all—from abaft the fore chains forward to the bow. Then she swung around, and smashed the whole quarter of us. Could see the cotton in the between deck through the sides where she struck us. The steamer separated from us right after the collision—went right across our bows to leeward. I did not see a green lantern that was taken from our ship after I got on the steamer. Landed on the place where all the mail boats land in New York. I went ashore about an hour after. Had no trouble with the captain or officers of the Berkshire. I got £4 at Cunard's office the first day I came ashore; that was the money the passengers gave us. I have had $2 since. They keep us pretty well at John Manning's. They don't keep anything to drink there. Sometimes when I get money I go to other places and get a drink.

Re-direct:

The collision started me from my feet and shook me. I was coming up on the poop, and the ship shook so that it capsized her to leeward.

Re-cross:

When the steamer struck us she was going 13½ miles an hour. They told us that the time we came aboard the steamer. Some of the crew told us. She seemed to me to be going very fast at the time.

Re-direct:

We were going about nine miles an hour.

Re-cross:

We were not going that fast the time we were lying aback. We did not lie aback at the time the steamer struck us.

MARTIN NEILSON.

Sworn to before me the 1st day of May, A. D. 1867.
GEO. F. BETTS, *U. S. Com'r.*

51 The further examination of witnesses in this cause is adjourned by consent to the second day of May, 1867, at 10½ o'clock a. m.
GEO. F. BETTS,
U. S. Commissioner.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et al vs. Steamship Scotia. Deposition of Martin Neilson. Filed May 3d, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this second day of May, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street in the city of New York, in the said southern district of New York, in the State aforesaid, William S. Simpson, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants, against the steamship Scotia, her tackle, &c.

And the said William S. Simpson, being about the age of thirty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said William S. Simpson, and he did thereupon depose, testify, and say as follows, viz:

I reside in Monmouth County, New Jersey; am a seafaring man. I expect to go to sea as soon as I get through here. I was on the Berkshire at the time of this collision with the Scotia. I was steward. Was on deck at the time of the collision; had been on deck three minutes when they struck. I had been in my berth before that, asleep. It woke

me up hearing them sing out, "Keep the steamer away," or "Keep our ship away," I don't know which. When I heard that I jumped out of my berth. I was not dressed. I didn't stop to dress. The forecastle is on deck. I saw the steamer when I came out. She was about off our starboard quarter; about one hundred yards away. She hit us right forward of the fore chains. I jumped on board of her. I jumped from between the fore and main rigging, from our rail, on to just front of the port paddle-box, on to the sponsons of the steamer. I had charge of the lights on our vessel. My duty was to trim them when I was told, and to have them placed out on deck ready to be hung in the rigging. We had a green and a red light. These were kept in the corner of my pantry, by the pantry door, when not set. Neither of those lights were set the night of the collision at eight o'clock. I turned in at half past eight. I saw both of them when I ran out three minutes before the collision. I ran right past them. They were in their proper place that was made for them, right alongside the pantry door. The lamps were in them. The lamps were not filled. It was about twelve days since they had been filled. I put them away where they were. Before putting them away I cleaned them up and scoured them out. I did not see either of these lights after the collision. I cleaned them and put them away by the captain's direction. The lamps had no wicks in them. They were regular side lanterns, round on the face and straight behind. The door to put the lamp in was on one of the square sides. The lamp had a tongue that slipped under a groove in the lantern to keep it steady when it was set. There was a knot on top with a ring through it. The ring was just large enough to put one finger through when the lanyard was in it. We had boxes in the rigging to set them—in the mizzen rigging, each side. The door in the lantern through which we put the lamp in was about three or four inches square. It had a door to it. The door fastens with a wire pin that slides up and down into a tin socket outside of the lantern. The wire has a little handle to push it up and down; that handle is a little twist in the wire. I kept the oil underneath the bread locker in the pantry. I burnt in the cabin that night a little round lamp, with a ring in it, that you could set down or put up. It was made of pewter or composition. It had a chimney to it; chimney about four inches high. This chimney rested on top of the lamp, and was fastened by two little catches on one side, and
52 screw on the other; burned kerosene in it. The chimney swelled out. In order to take this chimney off you would have to unscrew the screw and turn it out of the catches. Chimney got so hot after it was burning that you could not lift it off without using a cloth. Screw did not get so hot you could not unscrew it. Lamp was about an inch in diameter at the bottom. Wick would be about six or seven inches above table when lamp stood on table. It had a little wire ring to hang with. That ring was about an inch in diameter. It was fastened to the bottom of the lamp. The lamp swung in one ring that was rounded like a compass, with two points. You could unhook from the mast and set it on the table. It was generally hung on the mast. There was another lamp in the cabin; a writing lamp, or a bowsprit lamp. That was a very large brass lamp. It showed a white light. It was about eighteen or twenty inches high, and about ten or eleven inches square across. It was same shape as the colored lanterns. There was a brass lamp in it, set on to a round stud, projecting from the bottom of the lantern, and it was secured by being turned around till it was made fast in a catch, also on the bottom of the lantern. There was a little nick on the bottom of the lamp that fastened into this catch. This lamp stood about five

inches high before you got to the wick. It had no chimney to it. The lamp was round, and three inches in diameter; no wider anywhere than on the bottom. That was filled. I don't know whether it was burning on the night in question. The door to put this lamp in was about six inches high and five inches broad, and about the same as the door of the side lanterns—a little grain bigger, or thereabouts. I lit a white light a few minutes before going to bed that night. I asked the captain if he wished to have it set. He said no; he wouldn't need it now; not so long as the moon was up. I blew it out and made it fast to the table-leg in the cabin—in its proper place. That is the brass lantern that I have described. I made it fast to the table-leg with two lanyards—tied it fast. I don't know whether the Berkshire had any light set forward when the Scotia ran against her.

Q. Could any one have taken one of the colored lamps without going into your room?

A. They could. They couldn't get oil without my knowing it, because they always called me to get oil and trim the lamps. They never did such a thing without me. The colored lanterns were set in a regular box alongside the pantry door when not in use. I came home in the Scotia.

Q. Did you make any statement of how this happened to anybody?

(Objected to as being in the nature of cross-examination, and founded on a distrust of the party's own witness. Question withdrawn.)

Q. Did you make a statement to me (Mr. D. D. Lord) about this collision?

(Objected to on the same ground as above; also as being leading. Question withdrawn.)

Q. Did you not make a statement to somebody in Mr. Cunard's office?

(Objected to on both the grounds last mentioned. Question withdrawn.)

Q. Has Mr. Cunard paid your board, or become responsible for it, since you arrived here in the Scotia?

(Objected to as anticipating that such a question would be put on cross-examination, and as being put now for fear the witness would not answer truly then.)

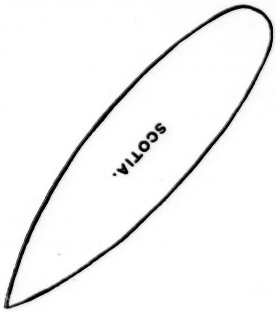
A. Yes, sir.

Cross-examined by Mr. Carter:

He has paid me $23; don't rightly know what day; I think, last Saturday; $10 was paid me in Mr. Cunard's office, $13 in Mr. Lord's office. I don't know whether same amount was paid to all the rest of our crew. I was made a present by the passengers on the Scotia of £4 and $3 50-100. Nothing else was paid me on the Scotia. I had $3 50-100 more than the men had. They had £4 each. It was given to me in Mr. Cunard's office, by the captain of the Scotia. The $23 I spoke of was in addition to this. I am boarding at 116 Madison street, with Mr. McEloy. I don't know whether my board bill his been paid or not. He has been down to see Mr. Lord, and I think Mr. Lord has made it all right with him. My berth was in the cabin, on the starboard side. I had my pants and shirt on when I got on deck; that is all. When I got on deck I stood right still and looked at the steamer strike us. I did not jump on her the moment she struck us. I jumped on her about six minutes after she struck us. I couldn't jump on her right off. I started to go and get what money I had, and I saw the steamer knocking our side in so that I thought I would leave it and save myself. I didn't go into the cabin again; I just walked back pretty

near to the cabin doors and then ran forward again to between the main and fore rigging. I stood still a little while—didn't know what to do. The galley was shut up. The pantry was on the starboard side of the forward end of the cabin. I rushed out pretty quick—as quick as I could. When I got out, and saw the steamer coming down on our quarter, I don't think she was going quite the same way that we were.

53



This diagram represents the position of the vessels the moment I came on deck out of the cabin, and saw the Scotia off our quarter. Our ship was going pretty fast when I came out; the steamer was going quite fast too. I thought then she would take our bowsprit out; I didn't expect she would hit our hull. I didn't trim the lamps unless I was ordered; got orders from the captain to trim lamps. I go and ask him if he wants them trimmed, and I do it or not, as he tells me, but the most part of the time he comes to me and tells me. I did not consider it my duty to trim the lamps unless I was ordered to. When the brass lantern was lighted, it was put on the anchor-stock. They had a little small lamp in the forecastle that swung on a piece of wire. I used a little tin lamp about my duties; that was kept in my pantry. There was in the after cabin, in the captain's bed-room, a brass lamp with a heavy weight on the bottom, that swung. When I trimmed that I

stood it on my table in my pantry, and the heavy lead weight made it stand up alone. We had also in the cabin the anchor lamp, to hoist in the rigging when the ship was to anchor; that was in my pantry, hung up on a hook. We had no other light, except that the mate had one in his room, which opened into the cabin, just opposite my pantry; that glass lamp with a chimney on it burned kerosene in it. The last I had anything to do with those colored lanterns was about twelve days before. When I got out of my berth a light was burning in the cabin, the one that hung up on the mizzenmast. It was burning quite bright. That was about twelve or thirteen feet from my pantry door. My berth was twelve or thirteen feet from the pantry door. The pantry door was nearer the companionway than my berth was. I took special notice of those colored lanterns as I came out, because I heard them hailing the steamer, and I thought it strange if the lights were up, and she was coming on to us. I knew the lights were not up, but still I looked to see, because I did not know but they might have done it; but I knew they would have had to come into my room to get kerosene, or to call me to trim the lamps. We burned kerosene in these colored lanterns; had no chimneys to the lights; can burn kerosene without chimneys. These colored lanterns hung one about three feet, the other about
54 four feet above the floor of the cabin, each in its box alongside the pantry door. The box was brass or copper, I think copper, just in the shape of the bottom of the lantern. The box is about two inches high. I heard the people on our deck sing out, when I came on deck, for the steamer to keep off, and port her helm, or for us to keep off, and to port our helm; I can't say which. The bow of the steamer struck us at the fore-chains. It didn't seem to be a very heavy shock. It punched a hole into her side there right down to the copper, so that we could see the cotton in the between decks.

Re-direct:

I don't know whether the mate's light was burning that night; it was a glass lamp with a chimney, with a flat round bottom; wick stood about three inches from the bottom; it was tied into an iron made fast over his desk. My lamp was not burning when I came out. I didn't see the anchor lamp; it was filled. That was a little round lamp that went up through a hole in the bottom of the lantern, and fastened with a stick through a hasp. It was a common globe lantern, with a flat bottom. This bottom has a hinge on one side and shuts up, and is made fast by a stick running through a staple on the opposite side. This anchor was commonly hung in the pantry; it couldn't be taken without going into my pantry. We used it to hang in rigging when at anchor, or to overhaul the chain or anchors. They had used this for a bright light since we left New Orleans, until they found that it would not stand the seaway as well as the bowsprit light. I can't say whether the captain's light was burning the night of the collision, for his room door was shut, but it was trimmed; that was a brass lamp; wick eight to ten inches from the bottom; that was a kerosene lamp, and burned with a chimney. I did not see any green light shown that night. I saw the captain when I came on deck; he had no green light in his hand. I know he hadn't. The blow staggered me some. It kind of pitched me both ways, till I steadied myself.

Re-cross:

I saw both of the captain's hands, without anything; I saw him catch hold of his wife. I first took notice of his two hands when I first came on deck. He stood with his arms slightly bent, his hands to the front

of him; I took particular notice of his hands; I didn't keep watch of his hands after that. I kept watch of him till his wife came out. He sung out for her, and she came out in her night-dress. He caught hold of her, and then I tried to take care of myself. I kept watch of him till his wife came out, to see what he was going to do.

WILLIAM S. SIMPSON.

Sworn to before me this 2d of May, A. D. 1867.

GEO. F. BETTS,
U. S. Commissioner.

(Endorsed:) 21, 38. U. S. district court. Paul Sears et als. vs. Steamship Scotia. Deposition of Wm. S. Simpson. Filed May 3d, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this sixth day of May, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Levi Densmore, to testify and the truth to say, on the part and behalf of the claimants, in a certain suit or matter of controversy now depend-
55 ing and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants, against the steamship Scotia, her tackle, &c.

And the said Levi Densmore, being about the age of thirty-eight years, and having been by me first cautioned and sworn, to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Levi Densmore, and he did thereupon depose, testify, and say as follows, viz:

I reside in New York City. I am a sea-faring man; expect to go to sea soon. I was cook on the Berkshire at the time of her collision with the Scotia. I was forward by the foremast, 3 or 4 feet from it. I had just come on deck. My room is on deck. I don't have to go below at all. I had just come out of my room, which is in the forward part of the house. Immediately on coming on deck I went right aft. I heard the captain sing out to "keep away." The mate was luffing. When the captain gave that order we were running 3 or 4 points free. After that order was given the Berkshire came right up into the wind, after the steamer struck her. The steamer struck her on the starboard bow, or we struck the steamer; I don't know which.

Q. After the captain gave the order "keep away," did your vessel come up into the wind, or pay off before the wind?

(Objected to, as leading.)

A. She must have paid off, because she struck us on the bow, and if we had been right dead before the wind she would have struck us amidships.

Q. What do you mean by saying that when the captain gave the order to bear away the ship came up into the wind?

(Objected to, on the ground that it does not appear he has said so.)

A. Because the mate had been luffing, and she had got up very near into the wind before the captain gave these orders, which the steamer would have gone quite clear of us, only when the captain kept away, the steamer took her on the starboard bow. She was not altogether before the wind at that time, but very near it when the steamer struck us.

Q. Did the captain's order to bear away bring your ship up into the wind, or make her pay off before the wind?

(Objected to, as not calling for facts, but for causes and reasons.)

A. It kept her away. Our ship pays off very quick, and did pay off quick after the captain's order. And the captain called for another man to come up and take the wheel. I couldn't tell how far she had got before the steamer ran against her. It was very dark. I was on deck till the steamer came against us. I was standing forward part of the deck abaft the foremast, 3 or 4 feet abaft, at the time of the collision. I couldn't see the captain. The captain was on the poop. I could see the poop, with the lights that were shining from the cabin. I think I could have seen if the captain had brought a light out of the cabin. I did not see him bring any light out of the cabin before the collision. We only had a bright light forward on the anchor-stock; no other light exhibited. We had two colored lanterns on board—the two side-lights. They were kept just between the cabin door and the pantry door, on the left side of the cabin door as you went in. I saw those lanterns after the collision. They were in that place, where they had been kept all the time. It was 10 or 12 days since they had been lighted. I ran into the cabin after the collision, because I had my arm hurt. I called out to the steward, but he had left and gone on to the steamer. When I got into the cabin I found no lamps burning but the captain's and mate's in their rooms. Both those were burning. The captain's lamp was smoking, and I turned it down. The lamp in the cabin had got broken.

Q. Was there any lamp on board except those belonging to the colored lanterns that could have been put into them?

A. Not to my knowledge. I never saw any that could be, and I have seen all the lamps that were on board.

Q. Did the captain give any reason for not setting the colored lights?

(Objected to, as leading.)

A. They were not trimmed. He gave orders not to trim them; said he was scarce of oil; that he wouldn't light them until he got into the channel, and to put them away. They hadn't been lighted for ten or twelve days. I didn't have plenty of lights. I had orders to put my light out, through the steward, as quick as my work was done. In all other ships I have ever been in, I have been allowed light till eight o'clock. There was a globe lamp on board with wires around it. After the collision. that was used to get the captain's wife over into the boat, and to look around the decks. The bowsprit light had two flat sides and a round side. It was made to fit under the jib-boom—an old light, such as ships used to carry. It showed a bright light, not colored. I saw that lying around the deck by the after hatch, after the collision,

all smashed to pieces. I got into the captain's gig, 6 or 8 men
56 in with me. Wilson, Anderson were in; Riley was not. Captain's lady had been put in, and was lying alongside. They took her out, and we got in. She went in one of the steamer's boats. That gig was let go adrift after we got into the steamer. The steamer sent two boats. I was told captain was the last man on the ship; Riley next to the last. Wilson took command of the boat I was in, and captain and Riley went in one of the steamer's boats. The gig left first. We left the two steamer's boats alongside. All but the captain, mate, and Riley had got into the boats when the gig left. I can't just now recollect the name of the second mate. The first mate was Mr. Mills. I heard a conversation between the mate and the second mate after we got on the steamer as to what caused the collision.

Q. What did they say the cause was?

(Objected to, as leading and incompetent and irrelevant.)

A. They said if they had the ship the course they were steering, they would not have come in collision; and they said, moreover, that if they had had their side lights there would not have been any collision. Both of them said it. The second mate was out on deck before I was. I can't say how long. I wouldn't take this vessel to be very sound, when you would see the water pouring out of her sides in streams, when she would list over and then straighten up again. The captain's wife did not come on deck, to my knowledge, till after the collision.

Cross-examined by Mr. Carter:

The door of my room opens right forward abaft the foremast. I saw the light of the steamer as I opened my door. It bore right on our starboard bow, as I came out of the door; might be two points or more on our starboard bow. I wouldn't say I was sure it was two points. I should say about five minutes, not more, after I came out, that vessel struck. The ship was luffing at that time. I think she was, but she might not have been. She might have been steady for a moment; I can't say. It was a very few minutes after the captain gave the order to bear away that the steamer struck.

Q. Say how many minutes, as near as you can.

A. Three or four.

Q. How far do you think the steamer was off when you first came out of your room?

A. I should say she was about four or five lengths of herself. Still, as she was running 14 or 15 knots, she was about that distance off, running at that speed. We were running about eight knots, I reckon. The first thing I did when I came on deck was, I went right aft. I got my arm a little hurt. I called for the steward to put something on it. He wasn't there. The captain's wife did it. I knocked a bit of skin off my wrist as I was coming out of my room. I went into the cabin as I went aft. Captain's wife was standing by the sofa. She asked me what was the matter with my arm. I told her I had hurt it. She got a towel and wound it up. The towel was lying in her room. She tied it on with a piece of string that was lying on her room floor. She put no application on it. I got it dressed when I got on the steamer. That didn't take me more than a minute. Then I came out on deck to assist in getting the boats out.

Q. Did you feel the shock of the collision while in the cabin?

A. All this was after the collision. I went back to my room after I first came out, after the steamer got away from us. That was after I

got my hand hurt. I only went back once. I went back to get a coat. It was after I got my hand dressed by captain's wife that I went back into my room. I did not go near the helm at any time.

Q. You said, on your direct examination, that the mate had been luffing before the captain gave the order to bear away; how do you know that the mate had been luffing?

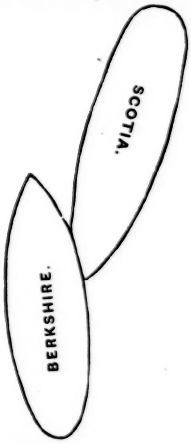
A. Because I could hear him singing out to luff. It was only two or three minutes before the captain gave the order to bear away, that I heard the mate singing out to luff. I couldn't say how the steamer's light bore from us when the captain gave the order to bear away. I could not say whether it bore over our port or starboard bow, I was so excited. Seeing her so close would make any body excited. Seeing her so close, and her coming into us or our going into her.

Q. When you saw the light about two points on your starboard bow was when you first came out of your room, was it?

A. Yes, sir.

Q. Did you at any time see the light of the steamer over your port bow?

A. No, sir; I can t say that I did. I did not go into the mate's room in the cabin, but I could see into it. I did go into the captain's room. The mate's room is just forward of the cabin; does not open into it; is opposite the pantry. I went into the captain's room to see if the steward or anybody was there to help with the trunks. I couldn't say whether the ship luffed up so far as to shiver her sails. It was after the collision that the captain's wife wound a towel around my hand. The pantry does not open into the cabin. It opens opposite the mate's door; corresponds to mate's door on opposite side, and quite a
57 large space between the two doors. It is about six or seven feet from the cabin door through this space to the main deck. There is a door at the forward end of this passage that opens into the main deck. That passage is covered. It is a part of the poop. This passage was not dark. You could see from the mate's room light burning. I was before the mast when a boy. They got up a subscription for us on the Scotia. I got £4. They have not paid me anything since at Mr. Cunard's office. I have been boarding since at 161 Washington street; have boarded there 15 years. I went to Cunard's office to see if mate or captain had come back. They owed me a little money. I saved some money—$20; gave half of it to the mate, and after he got his collection he wouldn't pay me back. I was right on port side of forward house when the blow came. It didn't knock me off my feet. I felt it. It was a very heavy blow—kind of a slanting blow; struck first, then fell off and struck us twice after; thumped together twice. The last two blows were not so heavy. She came in pretty swift upon us. They said aboard the steamer that she was steaming about fourteen knots an hour at the time she struck.

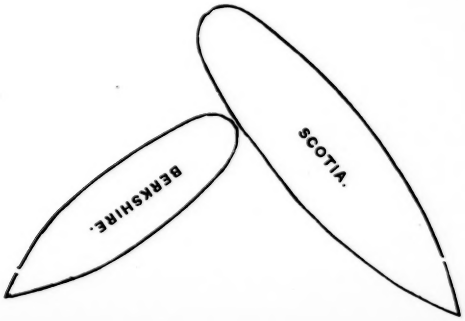


This is about the way the two vessels came together. I saw a bright light on the Scotia. I didn't take any notice of either of her colored lights. I didn't see either of them. I didn't look at her much.

Re-direct:

This diagram shows the way the vessels were coming towards each other when I first saw them.

I saw the steamer's sponsons; that was what cut our ship under the stern.



This is the way she was when her sponsons cut our stern.

LEVI DENSMORE.

58 Sworn to before me this 6th day of May, 1867.

GEO. F. BETTS,
U. S. Commissioner.

(Endorsed:) 21, 38. U. S. district court, southern district of New York. Paul Sears et al. vs. The Steamship "Scotia," her tackle, &c. Deposition of Levi Densmore. Filed May 6th, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this 6th day of May, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Gustav Anderson, to testify and the truth to say on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants against The Steamship Scotia, her tackle, &c.

And the said Gustav Anderson, being about the age of twenty-six years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Gustav Anderson, and he did thereupon depose, testify, and say as follows, viz:

I live in Norway; am a sailor. Expect to go to sea soon. I don't understand English very well. I was on the deck of the Berkshire when this collision happened. I was carpenter on her. I came on deck at 12 o'clock that night. I saw the steamer's light after it was reported.

Q. How did it bear from your ship?

A. I can't tell that.

Q. Did you notice whether it was on your port or starboard bow?

A. On the port bow, I think. I heard the mate give an order to luff. The ship came up into the wind. Afterwards I heard the captain give an order to keep off. The ship bore away. She had kept off 3 or 4 minutes when the steamer came into her. We had only a light forward on the anchor—a bright light. We had no colored lights set that night. I did not see the captain show any colored light that night. I saw a broken lantern on deck. I can't tell what kind of a lantern that was, whether a colored lantern or not.

Q. Was the ship rotten any?

A. Oh, no, sir; only middling. She did not leak much.

Cross-examined by Mr. Carter:

Q. Was she a pretty good ship?

A. Not so very good; middling, though. When I first saw the light I saw it over our port bow.

Q. How many points over your port bow?

A. I don't understand you.

59 This is the way the vessels were when I first saw them. The steamer had lights. She had a green light when I first saw her.

his
GUSTAV + ANDERSON.
mark.

Sworn to before me this 6th day of May, 1867.

GEO. F. BETTS,
U. S. Com'r.

(Indorsed:) 21, 38. U. S. district court, southern district of New York. Paul Sears et al. vs. The Steamship Scotia, her tackle, &c. Deposition of Gustav Anderson. Filed May 6th, 1867.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that, on this twenty-sixth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles Dunning to testify and the truth to say on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Paul Sears and others are libellants against the Steamship Scotia, her tackle, &c.

And the said Charles Dunning, being about the age of twenty-eight years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Charles Dunning, and he did thereupon depose, testify, and say as follows, viz:

I live in Liverpool; am a seafaring man; expect to go to sea to-morrow; bound for Liverpool. I was on the Scotia at the time of her collision with the Berkshire. I saw the Berkshire's light before the collision. I was on the forecastle head when I saw it, keeping a look-out. I was on the port bow. Harry Hermann was on the starboard bow keeping a look-out. The extra second officer was standing a little abaft me.

Q. Who first reported the light?

A. I did. It bore a point and a half off our port bow when I first saw it. Orders were given to me after I reported it. I was sent aft to the quartermaster to tell them to get two rockets ready. I went aft. The chief officer sent me. I got forward on to the forecastle before the collision happened.

Q. In going aft did you pass the chief officer?

(Objected to as leading.)

A. I did. He was stationed between the fore funnel and the foremast.

Q. Did you pass him coming back?

(Objected to as leading.)

A. I did. He was then abaft the foremast, looking with the glasses. I passed to the lee side of him—the starboard side of him. When I got back on to the forecastle the Berkshire bore off the cat-heads. I could just see her sails, and that was all. I saw no green light on board of her.

Q. Did you see any light on board of her but a white light?

(Objected to as pregnant.)

A. No, sir. When I got back to the forecastle the extra second officer was standing in the place where I had been on the look-out.

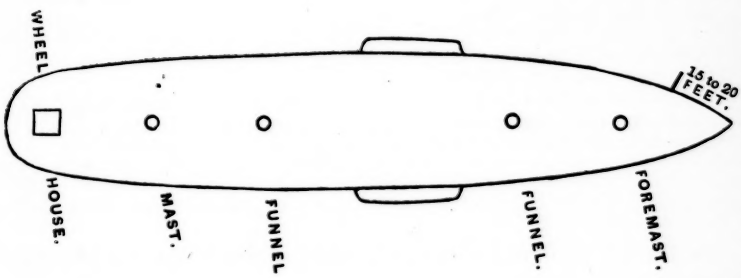
60 Cross-examined:

The Scotia has two masts—one forward of her forward smoke-stack, and the other aft of the after smoke-stack. The diagram exhibited shows the relative position of the masts, funnel, and machinery, not their distances apart. I can't say the distance from the foremast to the forecastle head; I think it is a little over 100 feet to where I was standing. The cat-head on that side is about 15 or 20 feet from the stem; it was abaft me, but close to me, about three feet off. The cat-head sticks out, as on the diagram. When I came forward again I returned to my old place, and then the Berkshire bore off our cat-head, and about three lengths of the Scotia off. The Scotia is close on 400 feet long. I went to the wheel-house, and the quartermaster was there at the wheel, on the side I was. I couldn't see the man at the other side. I looked in the window at the port side. Daniel Hyndman was at the wheel. I didn't see any rockets; don't know where they are kept. I told them to get the rockets ready, and they answered, "All right." I didn't wait to see what they did about it; I looked forward. I can't say which of them answered, "All right." When I reported the light the chief officer sung out, "Dunning, go aft and tell the quartermaster to get two rockets ready." He told me that about half a minute after I reported the light. I did not hear anything else said by anybody before I went aft. The wheel-house is about four feet from the stern—the after part of it; it is a square house. I did not hear anything said again until I came forward. After I got forward to my old place I heard the chief officer sing out, "Port," "Hard-to-port." At this time I could just see the vessel.

his
CHARLES + DUNNING.
mark.

Sworn to before me this 26th day of November, 1867.

GEO. F. BETTS,
U. S. Commissioner.



(Endorsed:) 21, 38. U. S. district court. Paul Sears et al. vs. The Steamship Scotia, &c. Deposition of Charles Dunning, look-out on "Scotia," for claimants.

United States district court, southern district of New York.

PAUL SEARS ET AL.
vs.
THE STEAMSHIP SCOTIA, HER TACKLE, APPAREL, &c.

Please take notice that, on the libel and answer herein, and on the opinion of Hon. Samuel Blatchford, I shall move, on Tuesday next, 2d day of March, 1869, at a stated term of this court, to be held at the city of New York, at 11 o'clock on that day, or as soon thereafter as counsel can be heard, for an order allowing the answer herein to be amended, by inserting in the answer, in the seventh section thereof, after the words, "Laws and customs both of England and the United States," the words, "And did not, as to lights, comply with
61 the rules of navigation and usages of the sea, which usually prevailed and were customarily observed at the time and place of the collision, among the ships which navigated the waters where the collision took place," and for such other and further relief as I may be entitled to in the premises.

February 27, 1869.

Yours, &c.,

D. D. LORD,
Proctor for Claimants.

Adjourned, by consent, to 6th of March, 1869, at 11.

SCUDDER & CARTER,
For Libellants.

(Endorsed:) 21, 38. United States district court. Paul Sears et al. vs. The S. S. Scotia, her tackle, &c. Notice of motion.

D. D. LORD,
Proctor for Claimants.

Due and timely service and notice of within motion admitted. February 27, 1869.

SCUDDER & CARTER,
Proctors for Libellants.

Filed March 6th, 1869.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 6th day of March, in the year of our Lord one thousand eight hundred and sixty-nine:

Present, the Honorable Samuel Blatchford, district judge.

PAUL SEARS ET AL.
vs.
THE STEAMSHIP SCOTIA, HER TACKLE, &C. } 21, 38.

On reading and filing notice of motion, with due admission of service thereon by the proctors for the libellants, and after hearing Mr. Lord, proctor for the claimants, in behalf of said motion, and Mr. Carter, in opposition thereto, it is ordered that the answer herein be, and the same hereby is, amended, by inserting in the seventh section thereof, after the words "England and the United States," the following:

"And did not, as to lights, comply with the rules of navigation and usages of the sea, which usually prevailed and were customarily observed at the time and place of the collision, among the ships which navigated the waters where the collision took place."

SAM'L BLATCHFORD.

(Endorsed:) Vol. 21, No. 38. United States district court for the southern district of New York. Paul Sears et al. vs. The Steamship Scotia, her tackle, &c. Order amending answer. D. D. Lord, proctor for claimants. Filed March 8th, 1869.

62 United States district court, southern district of New York.

PAUL SEARS ET AL.
vs.
THE STEAMSHIP SCOTIA, HER TACKLE, &C. } Amendments to answer.

In seventh section, after words "That the Berkshire had not the red and green lights required by the laws and customs both of England and the United States," insert the words: "And did not, as to lights, comply with the rules of navigation and usages of the sea, which usually prevailed and were customarily observed at the time and place of the collision, among the ships which navigated the waters where the collision took place."

D. D. LORD,
Proctor for Claimants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

EDWARD CUNARD, being duly sworn, saith that he is the agent in the city of New York of the British and N. Am. R. M. S. Packet Co., the claimants in the above action, and that the amendments to the answer herein are in all respects true, to the best of his knowledge, information, and belief.

E. CUNARD.

Sworn before me this 8th day of March, 1869.
[NOTARIAL SEAL.] DANIEL LORD, JR.,
Notary Public, City of New York.

(Endorsed:) 21, 38. U. S. district court, southern district of New York. Paul Sears et al. vs. The Steamship Scotia, her tackle, &c. Amendments to answer. D. D. Lord, proctor for claimants. Filed March 8th, 1869.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Thursday, the eleventh day of March, in the year of our Lord one thousand eight hundred and sixty-nine:

Present, the Honorable Samuel Blatchford, district judge.

PAUL SEARS ET AL.
vs.
THE BRITISH STEAMSHIP "SCOTIA," HER ENGINES, TACKLE, &c. } 21, 38.

This case having been heard on the pleadings and proofs, and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, that the libel filed in this action be, and the same hereby is, dismissed, with costs to be taxed against the libellants. And it is further ordered, that unless an appeal be taken to this decree within the time limited and prescribed by the rules and practices of this court, the libellants' stipulators pay into the registry of the court the amount of their stipulation for costs, and the clerk distribute the proceeds in satisfaction of the taxed costs.

SAM'L BLATCHFORD.

(Endorsed:) Vol. 21, No. 38. U. S. district court for the southern district of New York. Paul Sears et als. vs. The Br. Steamship Scotia, her tackle, &c. Scudder & Carter, proctors for libellants. D. D. Lord, proctor for claimants. Final decree. Libel dismissed with costs. Filed the eleventh day of March, 1869.

63 United States district court, southern district of New York.

PAUL SEARS, REUBEN HOPKINS, AND REBECCA K. SMITH, executrix of JAMES SMITH, deceased,
vs.
THE BRITISH STEAMER "SCOTIA," HER TACKLE, apparel, furniture, engines, &c.

SIR: The libellants intend to appeal from the final decree of the court in this cause.

Dated March 11th, 1869.

Yours, &c.,

SCUDDER & CARTER,
Proctors for Libellants.

To GEORGE F. BETTS, Esq., *Clerk.*

(Endorsed:) 21, 38. U. S. district court. Paul Sears et als. vs. The Scotia, &c. Notice of appeal. Scudder & Carter, proctors for libellants. Filed March 11th, 1869.

District court of the United States of America for the southern district of New York, in the second circuit.

Bond for costs on appeal.

PAUL SEARS ET ALS., LIBELLANTS, APPELLANTS,
vs.
THE BRITISH STEAMSHIP SCOTIA, HER ENGINES, tackle, &c., The British and North American Royal Mail Steam Packet Company, claimants, appellees. } 21, 38.

Know all men by these presents that we, Paul Sears and James C. Carter, are held and firmly bound unto the above-named claimants and appellees in the sum of one thousand dollars, to be paid to the said claimants; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the seventeenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas the above-named libellants have prosecuted an appeal to the circuit court of the United States for the southern district of New York, in the second circuit, to reverse the decree rendered in the above-entitled suit, by the judge of the district court of the United States, for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named libellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PAUL SEARS, [L. S.]
By JA'S C. CARTER, *Att'y in fact.*
JAMES C. CARTER. [L. S.]

Sealed and delivered, and taken and acknowledged this 17th day of March, 1869, before me.

GEORGE F. BETTS,
U. S. Commissioner.

64 UNITED STATES OF AMERICA,
Southern District of New York, ss:

JAMES C. CARTER, being duly sworn, doth depose and say that he resides in the southern district of New York; that he is worth the sum of two thousand dollars, over and above all his just debts and liabilities.

JAMES C. CARTER.

Sworn to this seventeenth day of March, A. D. 1869, before me.

GEORGE F. BETTS,
U. S. Commissioner.

Approved.

D. D. LORD,
Proctor for Appellees.

(Endorsed:) Vol. 21, page 38. U. S. circuit court. Paul Sears et als., libellants, appellees, vs. The British Steamship Scotia, her engines, &c., The British and North American Royal Mail Steam Packet Company, claimants, appellees. Bond for costs on appeal. Scudder & Carter, proctors, libellants and appellees. Filed this 17th day of March, 1869.

Circuit court of the United States, southern district of New York.

PAUL SEARS, REUBEN HOPKINS, AND REBECCA P. SMITH, executrix of JAMES SMITH, libellants and appellants,

vs.

THE BRITISH STEAMSHIP SCOTIA, HER TACKLE, apparel, furniture, engines, &c., The British and North American Royal Mail Steam Packet Company, claimants and appellees.

To the honorable the circuit court of the United States for the southern district of New York, in the second circuit:

The appeal of the above-named appellants respectfully showeth: That, on or about the twenty-sixth day of April, in the year one thousand eight hundred and sixty-seven, these appellants exhibited their libel in the district court of the United States for the southern district of New York, against The British Steamship "Scotia," her tackle, apparel, furniture, engines, &c., and against all persons intervening for their interest therein, claiming over fifty dollars, praying, among other things, for the reasons set forth in the libel, that said ship might be condemned and sold to pay the demand of these appellants.

That process issued out of the said district court, having been duly executed, on or about the twenty-seventh day of said April, the British and North American Royal Mail Steam Packet Company filed a claim to said steamship, her tackle, &c., in the office of the clerk of said district court, and thereupon stipulations were entered into and filed in the office of said clerk. That afterwards, and on or about the thirteenth day of June following, the said The British and North American Royal Mail Steam Packet Company filed its answer to the said libel in the said district court, praying, among other things, that the libel be dismissed, with costs, which answer was afterwards amended.

That the said cause came on to be heard before the Honorable Samuel Blatchford, judge of the said district court, on or about the 27th and 28th days of October, 1868, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties; and the said judge having advised thereon, on or about the twelfth day of March, 1869, made a decree or sentence in said cause, whereby it was, among other things, sentenced and decreed that the libel in this cause be dismissed, with costs. And these appellants are advised and insist that the said decree is erroneous, inasmuch as these libellants were entitled to a decree that said steamship be condemned and sold to pay the claim of the libellants, in accordance with the prayer of the said libel.

And these appellants, for these and other reasons, appeal from the whole of the said decree to the next circuit court to be held in said district, and, on the said appeal, intend to have the said cause heard
65 anew in the circuit court, on the pleadings and proofs in the district court, and other proofs to be introduced in the said circuit court; and they pray that the record and proceedings may be returned to the said circuit court, and that the said decree may be reversed, and that a decree be made that the appellants recover the damages sustained by them, as in the said libel set forth, with their costs.

SCUDDER & CARTER,
Proctors for Appellants.

I admit due service of a copy of the foregoing petition of appeal. Dated March 17th, 1869.

D. D. LORD,
Proctor for Appellees.

(Endorsed:) 21, 38. U. S. circuit court, southern dist. of N. Y. Paul Sears et als., libellants and appellants, vs. The British Steamship Scotia, her tackle, &c., The British and North American R. M. St. P. Company, claimants and appellees. Petition on appeal. Scudder & Carter, proctors for appellants. Filed March 17th, 1869.

66

67

68 (Indorsed:) U. S. circuit court. Paul Sears et al., libellants and appellants, vs. The Steamship Scotia, &c., and the Br. & N. Am. R. M. Steam Packet Company, claimants and appellees. Apostles. Scudder & Carter, proctors for libellants. D. D. Lord, proctor for claimant. John W. Amerman, law printer, No. 47 Cedar street, N. Y.

69 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the 18th day of February, in the year of our Lord one thousand eight hundred and seventy:

Present, the Honorable Lewis B. Woodruff, circuit judge.

PAUL SEARS, LIB'TS & APPELLANTS,
vs.
STEAMSHIP SCOTIA, HER TACKLE, &C., CL'M'TS & appellees.

The appeal from the district court in this cause coming on to be heard—

Mr. J. C. Carter read from the apostles on the part of libellant & appellant.

Mr. D. D. Lord read from the apostles on the part of claimants and appellees.

Mr. J. C. Carter argues the case on the part of the libellants & appellants.

Mr. D. D. Lord argues the case on part of claimants & appellees.

Mr. E. C. Benedict is heard on same side. C. A. V.

70

70½ At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Saturday, the 11th day of June, in the year of our Lord one thousand eight hundred and seventy:

Present, the Honorable L. B. Woodruff, circuit judge.

PAUL SEARS
vs.
THE STEAMSHIP SCOTIA, HER ENGINES, &C.

Judge Woodruff comes into court and reads his opinion in the above-entitled cause, affirming the decree of the U. S. district court.

71 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second cir-

cuit, held at the United States court-rooms, in the city of Ne
Friday, the 9th day of September, in the year of our Lord on
eight hundred and seventy:

Present, the Honorable Lewis B. Woodruff, circuit judge.

THE STEAMSHIP SCOTIA, HER ENGINES, TACKLE, &C. *ads.* PAUL SEARS & AL.

This cause having been heard on the pleadings and proofs, on the appeal of Paul Sears and others, libellants, appellants, and owners of the ship Berkshire, from the final decree of the district court of the United States for the southern district of New York, and having been argued by the advocates of the respective parties, and deliberation having been had in the premises, it is now, on motion of D. D. Lord, esq., proctor for claimants, appellees, ordered, adjudged, and decreed that the said final decree of the district court be, and the same hereby is, in all things affirmed with costs, to be taxed.

72 And it is further ordered, adjudged, and decreed that the said claimants, appellees, the British and North American Royal Mail Steam Packet Company, recover against Paul Sears and others, libellants, appellants, the sum of four hundred and fourteen dollars and ninety-four cents, being amount of costs taxed in the said district court, which it was adjudged by said court that the claimants recover of said libellants.

And it is further ordered, adjudged, and decreed that the said claimants recover against the said libellants the interest on the amount of said costs so adjudged by said decree of said district court from the date of said decree, viz., forty-three dollars and forty-three cents, besides the costs on said appeal, as taxed by the clerk, amounting together to the sum of ninety-five dollars and sixty-one cents, all of which said interest and costs, amount in the aggregate to the sum of five hundred and fifty-three dollars and ninety-eight cents, which it is hereby ordered, adjudged, and decreed that the said claimants, appellees, recover of the said libellants, appellants.

73 And it is further ordered, adjudged, and decreed that, unless an appeal be taken from this decree within the time allowed by law, a summary judgment therefor in favor of the said claimants, appellees, against the said libellants, appellants, and against Paul Sears and James C. Carter, sureties on the bond given to perfect said appeal, in the sum of one thousand dollars, the amount of their stipulation by them given on said appeal, and that the said claimants, appellees, have execution to satisfy this decree.

L. B. WOODRUFF,
Circuit Judge.

(Endorsed:) The St'ship Scotia ads. Paul Sears & al. Decree. Filed Sept. 9th, 1870.

74

75 Supreme Court of the United States.

PAUL SEARS, OF BOSTON, MASSACHUSETTS; Reuben Hopkins, of West Cambridge, Massachusetts; Rebecca K. Smith, executrix of James Smith, of the same place, sole and only owners of the late ship "Berkshire," her tackle, &c, libellants and appellants,
vs.

I admit due service of a copy of the foregoing petition of appeal. Dated March 17th, 1869.

D. D. LORD,
Proctor for Appellees.

(Endorsed:) 21, 38. U. S. circuit court, southern dist. of N. Y. Paul Sears et als., libellants and appellants, vs. The British Steamship Scotia, her tackle, &c., The British and North American R. M. St. P. Company, claimants and appellees. Petition on appeal. Scudder & Carter, proctors for appellants. Filed March 17th, 1869.

66

67

68 (Indorsed:) U. S. circuit court. Paul Sears et al., libellants and appellants, vs. The Steamship Scotia, &c., and the Br. & N. Am. R. M. Steam Packet Company, claimants and appellees. Apostles. Scudder & Carter, proctors for libellants. D. D. Lord, proctor for claimant. John W. Amerman, law printer, No. 47 Cedar street, N. Y.

69 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the 18th day of February, in the year of our Lord one thousand eight hundred and seventy:

Present, the Honorable Lewis B. Woodruff, circuit judge.

PAUL SEARS, LIB'TS & APPELLANTS,
vs.
STEAMSHIP SCOTIA, HER TACKLE, &C., CL'M'TS & appellees.

The appeal from the district court in this cause coming on to be heard—

Mr. J. C. Carter read from the apostles on the part of libellant & appellant.

Mr. D. D. Lord read from the apostles on the part of claimants and appellees.

Mr. J. C. Carter argues the case on the part of the libellants & appellants.

Mr. D. D. Lord argues the case on part of claimants & appellees.

Mr. E. C. Benedict is heard on same side. C. A. V.

70

70½ At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Saturday, the 11th day of June, in the year of our Lord one thousand eight hundred and seventy:

Present, the Honorable L. B. Woodruff, circuit judge.

PAUL SEARS
vs.
THE STEAMSHIP SCOTIA, HER ENGINES, &C.

Judge Woodruff comes into court and reads his opinion in the above-entitled cause, affirming the decree of the U. S. district court.

71 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second cir-

cuit, held at the United States court-rooms, in the city of New York, on Friday, the 9th day of September, in the year of our Lord one thousand eight hundred and seventy:

Present, the Honorable Lewis B. Woodruff, circuit judge.

THE STEAMSHIP SCOTIA, HER ENGINES, TACKLE, &C. *ads.* PAUL SEARS & AL.

This cause having been heard on the pleadings and proofs, on the appeal of Paul Sears and others, libellants, appellants, and owners of the ship Berkshire, from the final decree of the district court of the United States for the southern district of New York, and having been argued by the advocates of the respective parties, and deliberation having been had in the premises, it is now, on motion of D. D. Lord, esq., proctor for claimants, appellees, ordered, adjudged, and decreed that the said final decree of the district court be, and the same hereby is, in all things affirmed with costs, to be taxed.

72 And it is further ordered, adjudged, and decreed that the said claimants, appellees, the British and North American Royal Mail Steam Packet Company, recover against Paul Sears and others, libellants, appellants, the sum of four hundred and fourteen dollars and ninety-four cents, being amount of costs taxed in the said district court, which it was adjudged by said court that the claimants recover of said libellants.

And it is further ordered, adjudged, and decreed that the said claimants recover against the said libellants the interest on the amount of said costs so adjudged by said decree of said district court from the date of said decree, viz., forty-three dollars and forty-three cents, besides the costs on said appeal, as taxed by the clerk, amounting together to the sum of ninety-five dollars and sixty-one cents, all of which said interest and costs, amount in the aggregate to the sum of five hundred and fifty-three dollars and ninety-eight cents, which it is hereby ordered, adjudged, and decreed that the said claimants, appellees, recover of the said libellants, appellants.

73 And it is further ordered, adjudged, and decreed that, unless an appeal be taken from this decree within the time allowed by law, a summary judgment therefor in favor of the said claimants, appellees, against the said libellants, appellants, and against Paul Sears and James C. Carter, sureties on the bond given to perfect said appeal, in the sum of one thousand dollars, the amount of their stipulation by them given on said appeal, and that the said claimants, appellees, have execution to satisfy this decree.

L. B. WOODRUFF,
Circuit Judge.

(Endorsed:) The St'ship Scotia ads. Paul Sears & al. Decree. Filed Sept. 9th, 1870.

74

75 Supreme Court of the United States.

PAUL SEARS, OF BOSTON, MASSACHUSETTS; Reuben Hopkins, of West Cambridge, Massachusetts; Rebecca K. Smith, executrix of James Smith, of the same place, sole and only owners of the late ship "Berkshire," her tackle, &c, libellants and appellants,
vs.

THE BRITISH STEAMER SCOTIA, HER TACKLE, apparel, furniture, engines, &c., and the British and North American Royal Mail Steam Packet Company, claimants and appellees.

To the honorable the Supreme Court of the United States:

The appeal of Paul Sears, Reuben Hopkins, and Rebecca K. Smith, executrix of James Smith, deceased, the above-named libellants and appellants, respectfully shows: That, on the twenty-sixth day of April, one thousand eight hundred and sixty-seven, the above-named libellants filed libel in the district court of the United States for the southern district of New York, against the British steamer "Scotia," her tackle,
76 apparel, engines, &c., in a cause civil and maritime, for the recovery of damages to the sum of three hundred and ninety-five thousand dollars, alleged to have been sustained by them to the ship "Berkshire" and her cargo by collision with the said steamer "Scotia," on the ocean, in the prosecution of a voyage of the said ship "Berkshire," from New Orleans to Havre, on the eleventh of April, one thousand eight hundred and sixty-seven, and upon the issuing of process against said steamer Scotia, the said claimants appeared and filed a claim, and the execution of said process issued upon said libel was waived, and the claimants entered into stipulations and filed their answer to said libel, and such proceedings were thereupon had in the said court; that thereafter and on the eleventh day of March, one thousand eight hundred and sixty-nine, a final decree was made and pronounced therein by the said district court wherein it was adjudged and decreed that the said libel be dismissed with costs, to be taxed against the libellants; and that after such final decree your petitioners duly appealed therefrom to the circuit court of the United States for the southern district of New York in the second cir-
77 cuit; and the said cause was removed thereby into the said circuit court and there tried anew; and such proceedings were had in the said circuit court that afterwards, and on the eleventh day of June, 1870, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree of the district court be in all things affirmed, with costs; which said decree of the circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of of said circuit court to the Supreme Court of the United States, and respectfully pray that the said decree of the said circuit court and the libel, answer, pleadings, depositions, evidence, and proceedings, and further proofs in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew upon said pleadings, depositions, evidence, and further proofs; and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made that the appellants recover, against the said steamship "Scotia," the amount of the damages sustained by them, with costs, or such other de-
78 cree as to the said Supreme Court shall seem just.

SCUDDER & CARTER,
Proctors for Appellants.
JAMES C. CARTER,
Advocate.

(Endorsed:) Supreme Court of the United States. Paul Sears et al. vs. The British Steamer "Scotia," her tackle, &c., et al. Petition on appeal.

Due service of a copy of within notice of appeal hereby admitted, June 22d, 1870.

D. D. LORD,
Proct. for Cl'm'ts.

Filed June 22, 1870.

79 Circuit court of the United States of America, southern district of New York, in the second circuit.

PAUL SEARS, REUBEN HOPKINS, AND REBECCA K. SMITH, executrix of James Smith, deceased, sole and only owners of the late ship Berkshire, her tackle, &c., libellants and appellants,

vs.

THE BRITISH STEAMER SCOTIA, HER TACKLE, apparel, furniture, engines, &c., and the British and North American Royal Mail Steam Packet Company, claimants and appellees.

Know all men by these presents that we, Henry J. Scudder, of No. 116 East 17th street, in the city of New York, and James C. Carter, of No. 117 East 17th street, in said city, are held and firmly bound unto the above-named British and North American Royal Mail Steam Packet Company in the sum of two thousand ($2,000) dollars, to be paid to the said appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, ex-
80 ecutors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 21st day of June, in the year of our Lord one thousand eight hundred and seventy.

Whereas, the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the southern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal to effect and answer all damages and costs if *he* fail to make *his* appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES C. CARTER. [L. S.]
HENRY J. SCUDDER. [L. S.]

Sealed and delivered, taken and acknowledged, this 21st day of June, 1870, before me.

[L. S.]

W. A. HOYT,
Notary Public, N. Y. City & County.

81 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Henry J. Scudder and James C. Carter, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of four thousand dollars over and above all his just debts and liabilities.

JAMES C. CARTER. [L. S.]
HENRY J. SCUDDER. [L. S.]

Sworn to this 21st day of June, 1870, before me.
[L. S.]
W. A. HOYT,
Notary Public, N. Y. City & County.

(Endorsed:) U. S. circuit court. Paul Sears et al. vs. The Steamer Scotia, &c. Bond on appeal.

I consent that the within bond be approved.
N. Y., 22 June, 1870.
D. D. LORD,
Proct. for Cl'm'ts.

I approve the within bond, and the sufficiency of the sureties thereto.
June 22d, 1870.
SAM'L BLATCHFORD, *D. J.*

Filed June 22d, 1870.

82

83 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to the British and North American Royal Mail Steam Packet Company:

Whereas Paul Sears, Reuben Hopkins, Rebecca K. Smith, executrix of James Smith, sole and only owners of the late ship "Berkshire," her tackle, &c., have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said The British and North American Royal Mail Steam Packet Company, as claimant of the steamship "Scotia," her tackle, &c., and in favor of said steamship, her tackle, &c., and against the above-named Paul Sears and others, sole and only owners of the said late ship "Berkshire," her tackle, &c., and have filed the security required by law, you are hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

84 Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the twenty-second day of June, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-third.
SAM'L BLATCHFORD.

(Endorsed:) Supreme Court of the United States. Paul Sears et al. vs. The British Steamer "Scotia," her takle, &c., et al. Citation.

Due service of a copy of within citation hereby admitted.
June 22d, 1870.
D. D. LORD,
Proct. for Cl'm'ts.

Filed June 22d, 1870.

(Indorsement on cover:) No. 291. Paul Sears, Reuben Hopkins, et al., libellants, appellants, vs. The British Steamer "Scotia," her tackle, &c., The British and North America Royal Mail Steam Packet Company, claimant. S. New York, C. C. U. S. Filed 16th November, 1870.

U. S. Supreme Court.

PAUL SEARS ET AL.,

APPELLANTS,

versus

THE BRITISH STEAMER "SCOTIA,"

THE BRITISH & NORTH AMERICAN ROYAL MAIL STEAM PACKET CO.,

CLAIMANTS.

APPELLANTS' BRIEF.

JAMES C. CARTER,

Of Counsel for Appellants.

New York:

E. WELLS SACKETT, BOOK, JOB AND LAW PRINTER,

COR. WILLIAM AND PINE STREETS.

1871.

U. S. Supreme Court.

PAUL SEARS, *et al.*,
Libellants and Appellants,
vs.
THE BRITISH STEAMER SCOTIA, THE BRITISH AND NORTH AMERICAN ROYAL MAIL STEAM PACKET COMPANY,
Claimants.

Appellants' Brief.

PRELIMINARY STATEMENT.

The Appellants filed their libel in the District Court, as the owners of the American ship Berkshire, and also on behalf of the owners of her cargo, to recover the damage sustained by a collision with the British Steamship Scotia, whereby the Berkshire with her entire cargo was sunk and lost in mid ocean. The libel charged that the collision occurred through the fault of the Scotia.

The view of the case which the libellants took was substantially as follows:

The Berkshire was at sea in about lat. 49° N. and long. about 29° W., bound for the British Channel on a course by compass S. E. by E. half E., (this is after

making allowance for the variation, about an E. by S. course, making her head directly for the British Channel,) the wind about S. S. W., a six or eight knot breeze, and the starboard tacks aboard. The night was tolerably clear and fine.

About 2¼ o'clock, A. M., on April 8th, 1867, those on board the Berkshire discovered a bright light ahead, about a point on the port bow. It was the mate's watch at the time, and he at once ordered the man at the wheel to keep his luff, and rapped on the cabin for the master to come on deck. The master came on deck immediately, and he and the mate observed the light together for some little time, in order to make out what sort of a vessel it was and its course. It was a white light, and tended rather to close in on the bow of the Berkshire.

The master and mate being of opinion that it was a sailing vessel standing to the westward close hauled on the port tack, and that the Berkshire could not with safety attempt to cross her track to windward, the master ordered the helm up, so as to bear away and go round the stern of the approaching vessel.

The ships, at the time the light was first discovered by the people on board the Berkshire, were probably some eight miles apart, and at the time when the Berkshire first bore away, they were probably some three to five miles apart.

After the order was given to bear away, the master of the Berkshire, (the ship having no side lights set at the time, but a bright light set and burning forward) went into the cabin and procured a green light, brought it out and held it over the starboard side. At this time the light of the approaching vessel had been brought on the starboard bow of the Berkshire.

They could not as yet make out what the approaching vessel was, and the captain went into the cabin to get

his glass, leaving the green light in the hands of the mate. When he came on deck with his glass, and the approaching vessel was abeam, another light suddenly appeared, and in an instant vanished, so suddenly that the master could not tell whether it was white or green; it was not red. Just as it vanished, a red light came into view, and the captain discovered that it was a steamer. He instantly gave the order to hard up the the helm (it having been previously steadied), and the steamer came up at great speed, rounding off to starboard as she approached, and struck the Berkshire a somewhat slanting blow about the fore-rigging, smashing in her sides, and as the vessels swung together the sponsons of the steamer struck against the starboard quarter of the ship and broke her in there. (See Diagram C.)

The ship being in a sinking condition, her people went on board the Scotia and came to New York in her.

The theory of the claimants, *as developed by their answer*, was that they were steering on a course W. by N. ½ N., which would be, after allowing for the variation, about a W. by S. true course, when they discovered the white light of the Berkshire on their port bow (they don't say how much), and apparently four miles off. They thought she was a steamer. They at once ported the steamer's helm (they don't say how much) and the light kept broadening on their port bow for some time, until shortly before the collision (they do not say how long) when it began to close in. That thereupon the Scotia's engines were at once stopped and reversed, and her headway stopped; but the collision was inevitable, although, when it came, the blow was very slight, and would not have caused much damage except for the unseaworthy condition of the Berkshire.

They allege that when the vessels first discovered each other, and before any change in the course of either, their courses were divergent, the Scotia steering N. of

W., and the Berkshire S. of E., and each bearing on the port bow of the other, and that if the vessels had kept their courses no collision would have happened. That the Berkshire first luffed, which separated the vessels still further, but afterwards imprudently starboarded her helm and bore away, which brought the vessels together. That the Berkshire not showing any side-lights, it was impossible for the steamer to determine her course and the changes in it. It was evidently *intended* by the answer to make two points by way of defence: first, that the Berkshire changed her course *after* the Scotia had discovered her; second, that she showed no side-lights, according to the provisions of the act of Congress.

There is a remarkable discrepancy between the defence, as set forth in the *answer*, and the defence the claimants sought to establish by proofs and reasonings based thereon.

In the *answer*, it is alleged that the Scotia ported her helm *the moment the Berkshire's light was reported.*

In their *proofs* the claimants *attempted* (with what success we shall see hereafter), to establish that the Scotia *did not port her helm until a considerable period of time after* the Berkshire's light was reported. This discrepancy is important, since the fortunes of the controversy are deeply involved in the inquiry *how soon* the Scotia first took any step to avoid the collision, and *why* she did not sooner take some step.

This striking variance between the case made by the answer and that sought to be proved on the trial, might have been taken advantage of, and the point successfully made that the proofs not only did not support, but absolutely refuted the allegations of the pleading. But this point was waived except so far as the inconsistency of the answer with the proofs tended to discredit the latter.

The learned Judge of the District Court, in deciding

the cause, conceded substantially every position, whether of fact or law, taken by the libellants' Counsel upon the argument. He concluded, upon the evidence, that it was clear that the Berkshire had starboarded her helm and changed her course before her light was discovered by the Scotia, and that no subsequent change was made by the Berkshire, and therefore held that the change of course by the Berkshire was not to be deemed a fault on the part of that vessel.

He further held that the statute of the United States, requiring the exhibition of colored lights, was not, *proprio vigore*, binding upon the Berkshire; even in view of the circumstance that there was in force a municipal statute of Great Britain establishing the same regulation. He held that the question of liability was to be determined by the law of the place where the collision occurred, that is to say, by the law of the sea; and that this law was not affected by the municipal statutes of either nation, considered separately, or of both nations, viewed as concurring regulations.

He thus disposed of every question raised by the pleadings or upon the argument before him, and, in his view, were there no other questions involved, there should have been a decree for libellants.

But, in his view, he was required to take *judicial notice* of certain facts not proved, nor even suggested upon the trial or argument, namely, the existence of certain British orders in council and of certain municipal laws of numerous maritime States. He held that these *had changed the law of the sea;* not by their own force as municipal statutes, but by their concurrence upon the single point of side-lights and fog signals, so that by the *law of the sea* as it was at the time of the collision, it was obligatory upon the Berkshire to exhibit colored lights, and that the failure to exhibit them was the cause of the collision. (See Opinion of Mr. Justice Blatchford, 7 Blatch., 309).

Upon the appeal to the Circuit Court the questions of fact were again argued, and the question of law upon which the Judge of the District Court had rested his decision was argued for the first time.

The learned Judge of the Circuit Court took a very different view of some of the most important questions of fact from that adopted by Mr. Justice Blatchford, and held in substance that, aside from the question of law arising on the subject of the obligation to carry colored lights, and the consequences of a neglect to carry them, the Berkshire was in fault and the Scotia free from fault.

Upon the important question of law respecting the lights, Mr. Justice Woodruff concurred in the conclusion of Mr. Justice Blatchford, that the Berkshire must be held to the obligation to exhibit side-lights, even in a controversy with a British vessel; but he rested the grounds of his opinion upon widely different reasons.

The main questions now open for argument in this Court are therefore substantially the following:

First. Did the "Scotia" commit any, and what fault, in her manœuvres preceding the collision?

Second. Did the "Berkshire" aside from the matter of lights, commit any, and what fault, in her manœuvres preceding the collision?

Third. Is the Act of Congress requiring the exhibition of colored lights, to be enforced by our Admiralty Courts, in a controversy respecting a collision on the high seas, and outside of the jurisdiction of any nation, when the suit is between our own citizens, and the citizens of a foreign State?

Fourth. Even assuming that the Act of Congress is to be so enforced, was the failure on the part of the Berkshire to comply with the regulation a cause of the collision in this particular case?

POINTS.

First Point. The affirmative duty being upon the Scotia to take the requisite measures to avoid the collision, she is *prima facie* liable, unless she succeeds in showing a good defence.

Second Point. The Scotia interposed by her answer two defences. First.—That the Berkshire improperly changed her course, when by keeping it the collision would have been avoided. Second.—That she did not exhibit the colored lights required by law. These defences are to be dealt with in their order.

Third Point. So far as relates to the *manœuvres* of the vessels, the main struggle of the claimants at the trial was to establish the following view of the facts, namely:—That when the Scotia first made the Berkshire's light, *it bore from one to two points on her port bow; that it then gradually opened on the Scotia's port bow until it bore from five to six points over that bow, that is to say, two to three points forward of "abeam"; and that during this time the Scotia kept her course without change. That at this point the Berkshire changed her course, and bore down upon the Scotia's course, as indicated by the light beginning to close in. That at this moment the Scotia's helm was put hard a-port, and kept so until the collision occurred.*

1. This view of the facts was deliberately put forward for the purpose of making it appear that the

Scotia discovered the Berkshire's light when at a long distance off, observed its course and governed her own action accordingly; and that afterwards, in defiance of the maritime rule that a sailing vessel must keep her course when meeting a steamer, the Berkshire made a fatal change which frustrated the calculations of the Scotia, and led to the collision in question.

Fourth Point. The claimant's theory on this branch of the case labors under two distinct infirmities; and either one is fatal.

First. It is physically impossible.

Second. It is directly refuted by the overwhelming weight of the evidence.

I. It is *physically impossible.*

1. It requires the Berkshire, whose speed was about half that of the Scotia, to pass over a distance greater by far than the Scotia was to pass over *in the same period of time!*

See demonstration in Diagram A.

2. Sowerby, the chief officer, and the cornerstone of the defence, makes the distance of the Berkshire at the time he gave the order to port, from a mile to a mile and a half. (See his deposition, p. 29.) It is overwhelmingly established by the claimants themselves, that the order to port was given *not more than three minutes* before the collision. The distance for the Berkshire to run in order to intercept the steamer was being constantly increased by the *hard*

a-port helm of the latter. A ship under sail is thus required, while her speed is being checked by a helm *hard-a-starboard*, and by her sails becoming every moment more oblique to the wind, to pass over a distance of a mile and a half or two miles in three minutes? and this when her speed, with everything trimmed in the most favorable manner, was somewhere from seven to nine miles an hour!

(*a.*) If we take Sowerby's own statement as to the time between the order to port and the collision—five minutes at the most—the problem is impossible. The Berkshire could not have made *half a mile* in that period.

(*b.*) But Sowerby says, that the orders to the engine-room to *half speed, stop and reverse*, were given *as speedily as possible, and succeeded only by an interval of half a minute, the first order to port.* And *two minutes after* the order to reverse, an order to stop backing was given, and *this* was *after* the vessels were together. Sowerby himself thus barely makes out three minutes between the order to *port* and the collision.

(Sowerby's Deposition, p. 27.)

3. We might, in these conjectures as to time, interpret liberally the testimony of a witness, even one expected to be so exact, and required to be so exact as chief officer Sowerby; but the rest of the claimants' testimony on this point compels us to *reduce* instead of *enlarging* his estimate.

(*a.*) Charles Dunning says, that he heard Sowerby's orders, and that the Berkshire was so near that he could see her sails when the order was first given to *port.*

(Dunning's Deposition, p. 78.)

It may be said that this evidence, while it shows that the time of the giving of the order before the collision was very short, also shows that the distance was shorter than the mate's estimate. Of course it does; and at the same time proves that there was no such opening on the bow as the mate undertakes to show.

(*b.*) Andrew Heron and Daniel Taylor, engineers on the Scotia, and called by the claimants, both testify to the effect that the orders to the engine room, down to and including the order to reverse, succeeded each other *instantly*, and that the second order to stop, which was *after* the collision, was not more than a minute and a half after the order to reverse. Engineers are accustomed to judge of time with great accuracy.

(See depositions of Heron and Taylor, pp. 38, 41.)

(*c.*) John J. Cassidy, quartermaster of Scotia, was at the wheel at the time, and says, that the wheel had not been got over in obedience to the first order to *port*, when the second order to hard-a-port came, and that there was *but about a minute or two* between the time when they first got the wheel hard-a-port and the collision.

(Cassidy's Deposition, pp. 43, 44.)

(*d.*) Daniel Hyndman, also at the Scotia's wheel, says, on his direct examination, that the order to port was given *just* before the collision. On his cross, he says, from three to five minutes before. His phrase *just* before, evidently means some space of time, shorter than from three to five minutes.

(Hyndman's Deposition, p. 42.)

(*e.*) Here are six of the claimants' own witnesses, headed by Sowerby himself, from whose testimony the certain inference is that no more than three minutes elapsed from the time the order to port was given, and the collision.

(*f.*) It is hardly worth while to notice particularly the testimony of the three witnesses, Curll, O'Neal, and Breen, who were examined by claimants on commission. They were common seamen, and, it is obvious, speak with little judgment in measuring time by minutes.

(*g.*) The witness Chippendale, the officer at the "con," is of a different character. He seems to have conceived it his duty to buttress up the case after his own fashion, and ventures the remarkable statement, in direct contradiction to all the rest, that the Scotia ran two or three miles under a hard-a-port helm between the times of the giving of the first and second orders to port! This would have been abundantly sufficient to have turned her round, and headed her the opposite way, and made a collision utterly impossible. (Chippendale's Deposition, p. 32.)

II. Sowerby says in his evidence that the vessels were sailing, before any change took place, on nearly parallel, though opposite courses. The rest of the evidence corroborates this. It is sworn to by the claimant's own witnesses that, subsequently, the Berkshire luffed a point and a half, and it is proved by the libellants that she luffed three quarters of a point.

Now, on familiar geometrical principles, if at any time the Berkshire's light opened on the port bow of the Scotia, from five to six points, the

Scotia's light would also have opened on the port bow of the Berkshire five or six points, *plus* the one and a half points, or the three-quarters of a point, which she, the Berkshire, luffed, that is to say, six and a half to seven and a half points, or almost abeam.

But the claimants make no pretence that the Scotia's light, even under the influence of the Berkshire's luffing, ever got further on the port bow of the Berkshire than three or four points, (See demonstration, diagram B.)

1. Of the seven men belonging to the Berkshire's crew, whom the claimants called as witnesses to prove their case, four, namely, Cunningham, Riley, Wilson and Neilson, profess to speak of the *bearing of the light* from time to time on the bow of the Berkshire.

   Cunningham and Wilson say, it never got four points on the port bow; Neilson says it did not get over four.

   Deposition of Cunningham, p. 57.
   " " Wilson, p. 62.
   " " Martin Neilson, p. 65.

Riley alone says that it got nearly *a-beam*.
Riley's Deposition, p. 59.

2. We might clench this by the positive testimony of our witnesses, that it did not open on our port bow *at all*, but, for the present, we prefer to borrow no aid from our own proofs.

3. If it had traveled aft on the port bow of the Berkshire until it got nearly abeam before she starboarded, as the theory of the claimants requires, how could we believe two things which we should then be required to believe?

First, that the master of the Berkshire would, when an approaching vessel was nearly *abeam* on his port side, starboard his helm, and attempt to run down across her bows, in order to escape her? and second, how could he, starting from such a position, have succeeded in intercepting, we won't say a steamer of twice his speed, but a mud scow propelled by oars!!

4. The claimants' counsel, in examining his principal witness, Sowerby, evidently felt that that witness had placed the Berkshire at a fatal distance off, at the time the Scotia first ported—a mile or a mile and a half—and got him to say on his re-direct examination that he now felt, from what he had ascertained since the collision, that his judgment as to this distance might be erroneous—that the vessels were probably nearer. Of course, they were much nearer. But this tardy retraction is to no purpose. The fatal and destructive element in Sowerby's theory, which makes the collision absolutely impossible, *is not the distance apart* at which he places the vessels, but the *dimensions of the angle* formed by the line drawn through both vessels, and intersecting the course of the steamer. The difficulty is in making the Berkshire run down from a place five or six points, or even two points, on the Scotia's bow, and intercept her.

When two vessels of equal speed going in opposite or nearly opposite directions have reached a point where they bear on each other's bows five or six points, it is impossible for either to change her course, and run down and strike the other forward of the beam. *A fortiori* for the slow one to catch the faster one. The distance is immaterial, unless, indeed, it be but a few yards.

5. If this theory of the opening of the Berkshire's light on the bow of the Scotia is to be believed, it must be on the theological aphorism, "*credo quia impossibile est.*"

III. But this assertion of the opening of the Berkshire's light *before* the order to port—this keystone in the arch of the claimants' theory, is *wholly unsupported by the testimony even of the claimants.* Indeed, it is emphatically *disproved* by their testimony.

1. The claimants call eight witnesses from the deck of the Scotia, and of these *only one*, and he the *framer of the theory*, swears positively to this opening of the light. Sowerby is absolutely alone. The remaining seven either deny or substantially ignore it.

(*a.*) Chippendale, the quartermaster, says that when he first saw the light it was two points on the port bow. About three or five minutes before the collision it bore "before the beam." So it would if it continued to bear two points on the port bow. But this second view of Chippendale was *after*, according to him, the helm had been ported.

(Chippendale's Deposition, p. 31.)

(*b.*) Daniel Griffiths says he did not notice whether the light opened *before* the helm ported, but he says that he did see that it opened five or six points *after* the order to port. His testimony is clearly to the effect that all the opening of the light took place *after* the order to port.

(Griffith's Deposition, p. 39).

(*c.*) Charles Dunning says, that when the order to port was given the light bore just over

the port cat-head. This would not be as much as two points.

(Dunning's Deposition, p. 78).

(*d.*) John C. Nelson, extra second officer, was, by a leading question, induced to say that it *might* have opened a point. But he does not say whether this was before or after the porting.

(Deposition of John C. Nelson, p. 35).

(*e.*) John O'Neal, a look-out, who kept it in view all the time, ignores this pretended opening of the light.

(O'Neal's Deposition. Answers to 4th and 5th direct-interrogatories, p. 52).

(*f.*) William Breen, another look-out, faintly supports the alleged opening of the light, by saying that it first opened *a little*, and that when the first order was given to port, it might have been *rather over* two points on the port bow.

(Breen's Deposition. Answers to same interrogatories, p. 54).

(*g.*) William Curll, another look-out, kept it in view all the time, and says that it drew a little further aft, but he says that when he first saw the light it was about two points on the port bow, and that it was at the same bearing when the first order to port was given.

(Curll's Deposition, p. 50.)

IV. Finally and decisively, this pretended opening of the Berkshire's light *prior* to the Scotia's porting is wholly ignored, if not squarely denied in the answer; and this too, under the oath of Sowerby himself.

1. He swore to the answer, *just after the collision;* while his memory was fresh. His testimony was not given until a year afterwards, and after the libellants had taken their testimony. Is it not plain that this allegation by Sowerby, in his testimony of the opening of the light before the Scotia ported, is an afterthought, framed with the view of showing that the change of course by the Berkshire was after the Scotia had discovered her?

Fifth Point. If the preceding views are well founded, there seems to be no escape from the conclusion that this alleged opening of the Berkshire's light on the port bow of the Scotia, before the latter vessel ported, never occurred.

It is time to cast a glance at the consequences which flow from this conclusion; and they will at once be seen to be of a decisive character. The Scotia having made the light about two points on her port bow, and the light not opening *before* the Scotia ported, *the case admits of only two alternatives.* Either, first, the Scotia, after she made the light so near ahead as to make collision a very dangerous possibility, *kept on her course without change* until the last moment and then made a *false manœuvre, porting* when *starboarding* furnished the only means of safety; or, second, the Scotia did not discover the light at all until the vessels were in very near proximity, and then made the false manœuvre. It is immaterial which horn of this dilemma the claimants seize. Either is fatal.

The Western Metropolis; 2 Ben 399.
Ward *v.* Chamberlain; 21 How. 572.
The Queen; 2 Ben 533.
The Carroll; 8 Wall. 302.

Sixth Point. But the strength of the case is not yet exhausted. If it should appear from an examination of the evidence that the Berkshire did her starboarding *before the Scotia discovered her light*, the views above developed will be established beyond all question, and all pretence on the part of the Scotia, that the collision was in any degree attributable to the starboarding of the Berkshire will be fully exploded. The evidence does show, most conclusively, that the starboarding by the Berkshire *was before* the Scotia discovered the Berkshire's light.

I. In disproving, as has already been done, the pretence of the Scotia about the opening of the Berkshire's light on the bow of the former vessel, we have at the same time demonstrated that the starboarding had taken place *before* the Berkshire's light was discovered; for, otherwise, the Berkshire's light *certainly would* have opened on the Scotia's bows. The sweeping result of the previous refutation of this alleged opening is thus again seen.

II. We have also already shown that the time which elapsed between the *porting* by the Scotia and the collision did not exceed three minutes. The answer, *under Sowerby's own oath*, alleged that the porting took place *at once*, on the discovery of the light. It is highly probable that this is substantially true.

III. The fair inference, from the testimony of the claimants' own witnesses, who speak directly as to the point of time, leads to the conclusion that the discovery by the Scotia of the Berkshire's light preceded the order to port not more than two or three minutes, and preceded the collision not more than five or six minutes. There is much

diversity of statement, but this is the fair inference. Eight of the witnesses speak directly or inferentially of this period of time, viz., O'Neil, Curll, Breen, Sowerby, Dunning, John C. Nelson, Griffiths, Chippendale.

1. O'Neil says it was discovered ten minutes before the order to port. But this is utterly wild.

(Deposition of O'Neil, p. 52).

2. Curll says the order to port was given *a short time* after the light was reported; "after" (in the same sense as "as soon as") the mate had examined it with his glass; he subsequently says, "five or six minutes before the Berkshire struck us."

(Curll's Deposition, p. 50).

3. Breen says substantially the same thing, in the same way.

(Breen's Deposition, p. 54).

4. Sowerby does not state the time, but his oath to the answer is explicit enough.

5. Dunning makes it a short time, just long enough to enable him to go aft and give an order about the rockets.

(Dunning's Deposition, p. 78).

6. John C. Nelson does not state the time, but he says the light *stopped* opening three or four minutes before the collision, and this is the time, according to the claimants' theory, when the order to port was given.

(John C. Nelson's Deposition, p. 35).

7. Griffiths says the order to port was six or seven minutes before the collision. But we have

shown this to be a large exaggeration. He puts the distance of the Berkshire, at the discovery of the light, at "a mile, perhaps more."

8. Chippendale says the orders to port were given "shortly after the order came to get the rockets ready." It is conceded that the order to get the rockets ready followed immediately upon the discovery of the light.

(Chippendale's Deposition, p. 31).

9. The distance of the vessels apart furnishes corroboration. It was a signal error in Sowerby to imagine the Berkshire, as he says he did, to be six or seven miles off when her light was first discovered. He admits his error, but not to the full extent. In the answer sworn to by him he got it down to five miles. In his testimony he reduces it still further to four or five. Indirectly he reduces it still further; because he says that he had come to the conclusion that when the Berkshire's light began to close in, which was before he ported, she was less than a mile-and-a-half distant; and in the answer he swears that he ported *at once* on discovering the light. John C. Nelson, the extra second officer, cannot place it higher than three or four. Griffiths puts it at a little more than a mile. This last estimate is doubtless nearer the truth, though probably an under-estimate.

(Sowerby's Deposition, pp. 29 and 30).
(John C. Nelson's Deposition, p. 36).
(Griffiths' Deposition, p. 40).

IV. The fair conclusion from the testimony, therefore (aside from the conclusive demonstration afforded by the refutation of the theory that the Berkshire's light opened on the bow of the Scotia

before the order to port was given), is that as soon as Sowerby had fairly scrutinized the light with his glass, not more than one, or at the most two minutes, the order to port was given, making the whole time which elapsed between the discovery of the Berkshire's light by the Scotia, and the collision, not more than about five minutes.

V. Passing now to the deck of the Berkshire, and taking the testimony of her crew, it will appear most distinctly that she starboarded her helm long before the Scotia discovered her light.

1. Thomas Cunningham, one of the claimants' witnesses, says the starboarding was ten or twelve minutes before the collision.

Cunningham's Deposition, p. 56.

2. Thomas Riley, also one of the claimants' witnesses, says it was seven to eight or ten minutes, and then adds, "It was ten minutes, anyhow."

Riley's Deposition, p. 60.

3. James Wilson, also one of the claimants' witnesses, says it was six or seven minutes *after the Berkshire payed off* before the steamer struck. Of course she did not pay off until some minutes after the helm was starboarded. He makes it an hour after the discovery of the Scotia's light before the collision, and says that the ship continued to luff twenty or thirty minutes. On his views of the lapse of time, the starboarding was about midway between discovery of the light and the porting, which would make it at least ten minutes before the collision. And the learned Judge of the Circuit Court agrees in this result.

Wilson's Deposition, pp. 62, 63.
Judge Woodruff's Opinion, pp. 330, 331.

Seventh Point. The extraordinary departure by the claimants from the case made by their answer, a departure principally exhibited in the testimony of their main witness, Sowerby, has been alluded to. We have waived the point that the proofs must conform to the allegations, but this shifting of ground is of itself a feature of the defence deserving a separate consideration.

1. Mr. Sowerby was the first officer of the Scotia—a post of the greatest responsibility. He was in command of the ship at the time, and an eye-witness of the whole of the occurrence. He is, besides, a most intelligent officer. Of course, it was upon his statement that the answer had been framed.

2. He made oath to the answer containing *one* view of the facts. It was perceived, before the trial, to be necessary to change this view in a most material particular, and Sowerby was found equal to this exigency. In his testimony he swears to *another and very different* view. It does not follow, from this, that the view put forth in his testimony is not the true one, but it *does follow* that it requires the *most satisfactory evidence* to establish it.

3. When it is seen that the view of the facts put forth by his testimony is—

First. Impossible in itself.

Second. Contradicted by his own answer.

Third. Contradicted by the majority even of the witnesses called by the claimants; and,

Fourth. Contradicted by all the libellants' witnesses, the refutation may be pronounced complete.

4. That the Berkshire's light did open *at some time* on the port bow of the Scotia is highly probable. Such would be the direct effect of heaving the Scotia's helm hard a port; but this did not occur until *after* the Scotia's helm was ported; and was the *consequence* of that porting; and this accords entirely with Sowerby's statement in the answer.

5. The possibility that Mr. Sowerby in his testimony has honestly, through failure of memory, represented an opening of the light which occurred *after* the porting as having taken place *before* that time is the single consideration which rescues his testimony from grave suspicion.

Eighth Point. Whatever degree of confidence the Appellants' counsel might feel in the force of the conclusions which have been reached, they would not be justified in passing by the adverse views of so distinguished an authority as Mr. Justice Woodruff, without giving them a most attentive examination. That learned Judge, well aware that the point made by the libellants, to the effect that the Berkshire's light never opened on the port bow of the Scotia *until after* the latter *ported*, stood directly in the path of the conclusion he sought to demonstrate, denies the proposition. The precision with which he has stated the grounds of his denial enables us to meet it with like distinctness; and it is re-

spectfully submitted that he has fallen upon this material point into serious error.

(See his opinion, 7th Blatch., 335 to 338.)

1. His argument upon this point, briefly stated, is this:

First. The claimants' witnesses positively swear that the light of the Berkshire *did* open on the port bow of the Scotia *before* the latter ported.

Second. The effort of the libellants' counsel to overcome this positive testimony by showing that with the positions, courses, and relative speed of the two vessels as admitted or established, it was *impossible* for the light so to open, does not avail. It was *not impossible.*

Third. The further effort of the libellants' counsel to overcome this positive testimony by showing that if the light had so opened on the Scotia's port bow, the Berkshire could not possibly have got down upon the track of the Scotia so as to make a collision possible, does not avail. She *could* have got down upon the Scotia's track, notwithstanding she at first receded on the port bow of the Scotia.

2. As to the first position of the learned Judge. He has greatly overstated the amount and weight of this positive testimony.

(*a.*) He seems to be under the impression that *all*, or at least *several* of the Scotia's witnesses who saw the Berkshire's light swear positively that it did so open *before* the Scotia ported. This is not so. There is but *one* whose testimony can be properly called positive upon this point.

One or two others very faintly support the notion.

(See Sub-division III of Fourth Point.)

(*b.*) The one witness who does swear is *Sowerby himself*, when struggling to free himself from responsibility; and this too after he had in the answer, sworn to by him long before his testimony was given, and while memory of the facts was recent, affirmed in substance that this opening did not occur until *after*, and as a consequence of, the porting. Of this important consideration the learned Judge takes no notice.

(*c.*) The real amount of *testimony* in support of this alleged opening of the Berkshire's light *before* the porting, is therefore, when justly weighed, extremely meagre.

8. Next, as to the second branch of the learned Judge's argument, namely, that such an opening of the Scotia's light was possible. He finds his way to this possibility by assuming, first, that it is not necessary to take this opening of the light to have been *so wide* as the Scotia's witnesses swear it was. Then, although he concedes that it is fully proved that the Berkshire starboarded *before* her light was discovered by the Scotia, he yet thinks it was not *long* before, and that consequently the Berkshire may not, at the time of the discovery of her light by the Scotia, have got so far round before the wind as to bear perpendicularly, or at a very small angle, upon the path of the Scotia. With the aid of these two assumptions he concludes that the speed of the Scotia was sufficiently great to cause the light of the Berkshire to open on the port bows of the former.

Let us subject this conclusion to a test under conditions which shall favor it at every point.

Let us yield the benefit of both the above favorable assumptions. The speed of the Scotia was, as found by the learned Judge, not quite twice that of the Berkshire. We shall give the full benefit of all the allowances asked for, if we take the speed of the Scotia on her path to be equivalent to *three times* the speed with which the Berkshire was advancing on a perpendicular line towards t at path. Let Sowerby's own estimate be taken as to the bearing of the Berkshire's light when first discerned on the Scotia's bow, namely one point and a half. There are many reasons for supposing that it was, in fact, nearly dead *ahead.*

Now, on Diagram D, the Scotia is at B, on a course, B. E. C, and the Berkshire at A, on a course, A. D. C. The angle A. B. C, is (by measurement), 16° 42′, that is to say, one and a half points. When the Scotia arrives at E, the Berkshire will have reached D; but the angle D. E. C, is less (by measurement) than the angle A. B. C. *Ergo*, even under those favorable conditions, the light of the Berkshire could not have opened on the Scotia's bow, but would have closed in. Indeed, the line B. E. C. is nearly *four times* as long as the line A. D. C, so that the Scotia would need a rate of speed nearly *four times* as great as that of the Berkshire in order to reach C, as soon as the latter; in other words, in order to *prevent* the Berkshire's light from closing in.

(*a.*) It would seem almost like weakening the force of a demonstration like the above, to point out why such a result is probable and reasonable; but still a single suggestion is not out of place. When one object, say the Scotia, is proceeding across the path of another object, say the Berkshire, which, as in the case supposed,

bears at a small angle with the course of the first object, such first object must proceed at a vastly superior rate of speed, in order to increase that angle. If, for instance, the Berkshire had been stationary, and her light had been made by the Scotia *directly ahead*, namely, at C, on the diagram, the motion of the Scotia, however rapid, would have had no tendency to draw the light aft on her port bow, and *in proportion* as the angle at which the light bore when first discovered was small, in just such proportion would the motion of the Scotia towards it have little effect; but place the light at a large angle with the Scotia, and then her motion would rapidly draw the light aft on the port bow, so that when the light had reached a point nearly abeam, it would be swept with the whole rapidity of the Scotia's motion along her port side. Indeed, it is manifest that in moving *towards* objects *nearly ahead*, their angle with the course of the moving object is very slowly increased, even if they are stationary; and it takes, under such circumstances, but little motion towards the course of the moving body to counter-balance the effect of much superior motion on the part of the latter; but in moving *by* objects which are at a large angle with the line of motion, such angle is very rapidly increased, unless they have themselves a rapid motion towards the line of motion of the other moving body.

4. As to the reasons suggested by the learned Judge for believing, contrary to the argument of the libellants' counsel in the Court below and here, that it was possible for the Berkshire, even after she had been brought further aft upon the port-bow of the Scotia, to sail down and reach the track of the latter so as to cause a collision, they possess even less of solidity. The first reason

suggested is that possibly the Berkshire had not come to bear in a perpendicular course upon the path of the Scotia until some little time after the latter discovered her light. The evidence is quite the other way; but let this go for what it may be worth.

It is also suggested that probably, or perhaps, the light had not after all opened but little on the Scotia's port bow, when it began to close in. But, surely, to argue in order to meet one difficulty, that the light *did* open, and then, in order to meet another difficulty occasioned by that very *opening*, to argue that such opening did not amount to much after all, is not a very solid or satisfactory method of reasoning.

It is further suggested by the learned Judge that when the Berkshire, under the influence of her starboard helm, got *before the wind*, she acquired increased speed, which enabled her to intercept the Scotia. But this is an entire misapprehension of the effect of wind upon sails. The Berkshire before she starboarded had the wind two or three points *free*, that is to say, *a beam*, or a little abaft the beam. This is the most favorable of all quarters to have the wind from for rapid sailing. Besides, as she bore away before the wind, in order to avail herself of the breeze coming aft, her yards should have been squared; but not a brace was touched on this occasion, and the wind consequently struck her sails after she bore away, at a very unfavorable angle.

The other consideration suggested is that the Scotia checked her speed after she ported. This is true, and let the utmost allowance be made for this; but the effect of it was manifestly more than overcome by her hard-a-port helm which was carrying her constantly more and more away from the Berkshire.

bears at a small angle with the course of the first object, such first object must proceed at a vastly superior rate of speed, in order to increase that angle. If, for instance, the Berkshire had been stationary, and her light had been made by the Scotia *directly ahead*, namely, at C, on the diagram, the motion of the Scotia, however rapid, would have had no tendency to draw the light aft on her port bow, and *in proportion* as the angle at which the light bore when first discovered was small, in just such proportion would the motion of the Scotia towards it have little effect; but place the light at a large angle with the Scotia, and then her motion would rapidly draw the light aft on the port bow, so that when the light had reached a point nearly abeam, it would be swept with the whole rapidity of the Scotia's motion along her port side. Indeed, it is manifest that in moving *towards* objects *nearly ahead*, their angle with the course of the moving object is very slowly increased, even if they are stationary; and it takes, under such circumstances, but little motion towards the course of the moving body to counter-balance the effect of much superior motion on the part of the latter; but in moving *by* objects which are at a large angle with the line of motion, such angle is very rapidly increased, unless they have themselves a rapid motion towards the line of motion of the other moving body.

4. As to the reasons suggested by the learned Judge for believing, contrary to the argument of the libellants' counsel in the Court below and here, that it was possible for the Berkshire, even after she had been brought further aft upon the port-bow of the Scotia, to sail down and reach the track of the latter so as to cause a collision, they possess even less of solidity. The first reason

suggested is that possibly the Berkshire had not come to bear in a perpendicular course upon the path of the Scotia until some little time after the latter discovered her light. The evidence is quite the other way; but let this go for what it may be worth.

It is also suggested that probably, or perhaps, the light had not after all opened but little on the Scotia's port bow, when it began to close in. But, surely, to argue in order to meet one difficulty, that the light *did* open, and then, in order to meet another difficulty occasioned by that very *opening*, to argue that such opening did not amount to much after all, is not a very solid or satisfactory method of reasoning.

It is further suggested by the learned Judge that when the Berkshire, under the influence of her starboard helm, got *before the wind*, she acquired increased speed, which enabled her to intercept the Scotia. But this is an entire misapprehension of the effect of wind upon sails. The Berkshire before she starboarded had the wind two or three points *free*, that is to say, *a beam*, or a little abaft the beam. This is the most favorable of all quarters to have the wind from for rapid sailing. Besides, as she bore away before the wind, in order to avail herself of the breeze coming aft, her yards should have been squared; but not a brace was touched on this occasion, and the wind consequently struck her sails after she bore away, at a very unfavorable angle.

The other consideration suggested is that the Scotia checked her speed after she ported. This is true, and let the utmost allowance be made for this; but the effect of it was manifestly more than overcome by her hard-a-port helm which was carrying her constantly more and more away from the Berkshire.

5. We therefore refer the Court again to diagram A, and to the preceding argument on this head, under the Fourth Point, and repeat that the conceded facts *tolerate no opening whatever* of the Berkshire's light on the port bow of the Scotia before the latter ported; and that it is even *grossly* manifest that this collision never could have occurred *unless* the Berkshire's light had been at a very small angle on the Scotia's bow when the latter ported. It is upon the undisputed facts very difficult to allow the possibility that the Berkshire's light was ever at any time seen *more than a point* on the Scotia's bow.

6. Everything that is established beyond contradiction in this case serves to show that the Scotia made the Berkshire's light a trifle on her port bow, and after observing it for a short time and seeing that it was closing in, the Scotia, following a practice which seems inveterate with the British navigator, *ported* her helm. The precise effect of this, of course, was to send the Scotia *chasing after and following up* the Berkshire; as is made manifest by the admitted fact that the Scotia before the collision had swung around to starboard about *seven* points, and finally struck the Berkshire a very angular blow, and the vessels then fell alongside. All this is intelligible, free from inconsistencies and improbabilities, and fortified by all just inferences from the evidence. The moment this view is departed from, a maze of absurdities and improbabilities is encountered which it is impossible to harmonize.

Ninth Point. As to the libellants' theory. It is established by the testimony of the four witnesses called by the libellants.

1. the testimony of the master and mates of the Berkshire is especially referred to the attention of the Court as a plain, clear and truthful statement of the facts, in harmony with the libel, in harmony with all the undisputed facts, vitiated with no concealed impossibility or improbability, and supported in its main features even by the weight of the testimony introduced by the claimants.

See Diagram C.

2. The theory of the libellants is briefly this: that the Scotia's white light was first made about one point on the Berkshire's bow, and some twenty to thirty minutes before the collision; the mate was then in charge of the deck, it being his watch, and he supposed it to be a sailing vessel standing to the westward and close hauled on the wind. As the Berkshire was sailing free, it was under such circumstances her duty to keep out of the way of other sailing vessels who were close hauled. The mate, therefore, ordered the man at the wheel to "keep his luff," that is, to run nearer to the wind, which was done and the course of the Berkshire thus changed to windward about three-quarters of a point. The mate also immediately called the master, who came on deck, and they both observed the light together. The master found that the luffing did not have the effect of shaking the light off his bow, and he, also supposing that the light was on a sailing vessel standing to the westward, close hauled, and that her course was nearly opposite to his, but really crossing his bow, deemed it to be the safest course to starboard his helm and bear away before the wind while the light was yet a great way off and there was ample time. He accordingly did so. Having no colored lights set at the time, he went into the cabin and put a light into the green lantern and came out and caused it to be exhibited over the starboard side of the ship, the light of

the Scotia having at that time, under the effect of the starboarding, been brought upon the starboard side. The master then went into the cabin and brought out his glass. The ship was kept away under her starboard helm until the light was brought abaft the beam on the starboard side, and then the helm was steadied. Soon after a red light was discovered and then they were satisfied that the vessel was a steamer. The helm was ordered again hard-a-starboard, but the steamer came up with rapidity and struck the ship an angular blow just abaft the fore-rigging, breaking her open, and then the vessels fell alongside, the sponsons of the steamer striking violently against the Berkshire's quarter and breaking her in there. She soon began to sink, and her crew were taken on board the Scotia.

Tenth Point. In refuting the theory of the claimants the libellants' theory is established, and by the same reasoning.

1. The libellants' view was contradicted by that of the claimants in two main particulars only; *first* in the alleged opening of the Berkshire's light on the bow of the Scotia *before* the latter vessel ported; *second*, as to the time when the Scotia first discovered the Berkshire, whether it was before or after the Berkshire starboarded. In both these respects the pretences of the Scotia have been refuted.

2. The claimants have not in their proofs made any *direct* point that the Scotia made the Berkshire's light before the latter starboarded. This was de-

signed by them to be covered by their point relating to the opening and drawing aft of the Berkshire's light on the bow of the Scotia. The inference thus designed, of course fell with the foundation upon which it was based.

3. But we have gone further, and proved by the direct testimony of witnesses on the single point of time that the Scotia did not discover the Berkshire's light until five or six minutes before the collision; whereas the Berkshire starboarded from ten to fifteen minutes before the collision. The larger part of this evidence comes from the claimants' witnesses themselves.

4. It may be claimed that the witnesses called for the claimants from the deck of the Berkshire have proved that the Scotia's light opened broadly upon the port bow of the Berkshire before the latter starboarded, which is a corroboration of the Scotia's theory. One or two of them have so testified; but there can be no question but that the weight of the evidence shows that the Scotia's light never drew aft on the Berkshire's bow to any considerable extent, notwithstanding the luffing by the Berkshire.

(*a.*) The libellants called three witnesses who testified distinctly that the light did not open on the Berkshire's bow. They are the most intelligent men from the deck of the Berkshire.

Berry's Deposition, p. 11.
Mill's " p. 14.
Von Wyngard's p. 23.

(*b.*) The claimants called Thomas Cunningham, of the Berkshire's crew, who testified: That the light when first reported bore about three points, perhaps more, on the Berkshire's bow, and *nearly four* points when the order was given

to bear away. This rather shows a *closing in;* for the Berkshire luffed considerably, which would tend of itself to make the light open.

(Cunningham's Deposition, p. 56, 57.)

(*c.*) James Wilson, one of the Berkshire's crew called by claimants, testified: That the *luffing* brought the Scotia's light about three points on the Berkshire's port bow. But he swears to no other opening.

(Wilson's Deposition, p. 62.)

(*d.*) Martin Neilson, one of the Berkshire's crew, called by the claimants, testifies: That he saw the light when it was first reported, that it was *then* four points on the port bow, and that *it did not get any further aft.*

(Deposition of Martin Neilson, p. 65.)

(*e.*) Thomas Riley, alone of all the witnesses called by either side from the deck of the Berkshire, testifies to any considerable opening of the Scotia's light on the Berkshire's bow. He says, when first discovered, it was a point or a point and a half on the bow, and that the luffing brought it nearly *abeam!* The manifest absurdity of this statement is a sufficient refutation.

(Riley's Deposition, p. 59.)

5. We ought not perhaps to allow to pass unnoticed the attempt on the part of the Scotia to show that the bows of that vessel did not in fact strike the Berkshire, but that the vessels ranged alongside of each other. But the overwhelming evidence as well of the witnesses called by the claimants from the deck of the Berkshire as of our own, incontestably establishes that the bow of the Scotia *did* strike the Berkshire just abaft her fore

rigging at an angle of about 45 degrees, and with a force that cut the sailing vessel through from the rail down to the water.

(*a.*) The fact that there was no abrasion of the bows of the Scotia is entirely consistent with this. She was an immense vessel, and constructed of iron. The wooden sides of the Berkshire would as readily yield to such an object as soft wood to the blade of a knife.

(*b.*) Nor is the fact testified to by Capt. Judkins, that when he came on deck the vessels were alongside of each other, of any moment. This was after the collision, and the direct result would naturally be to bring the vessels alongside.

Eleventh Point.—Upon the first of the two main branches of this controversy, therefore, the case stands thus: The Berkshire saw the Scotia's light a long time before her own was discovered by the latter, and had changed her course by starboarding before she was discovered. She made no change after the Scotia made her light. *The Scotia does not pretend when she made the Berkshire's light, be the distance at that time between the two vessels greater or less, that it was not ample to enable her to take every precaution against collision.* She saw an object bearing a light almost in her path, and which was apparently moving across her course. A collision was, of course, within the range of a near probability. Her first error was in *not stopping at once.* Her second error was in *porting.* On the settled rules of the sea she is responsible for the collision.

1. The only thing she can offer in her defence is that the Berkshire did not carry side-lights. Whether there is any rule, written or unwritten, that imposed this as an obligation on the Berkshire, and if so, whether the failure to comply with such rule was a contributory cause of the collision, will hereafter be considered.

2. The fact of the change of course by the Berkshire is wholly immaterial. It was made before she was discovered by the Scotia. "*De non apparentibus et de non existentibus eadem est ratio.*" The rule requiring the sailing vessel to keep her course is based upon the notion that the steamer, who has control of herself, can and will shape her own conduct upon the presumption that the canvas will not change. Of course the rule has no application to movements made beyond the view of the steamer.

Twelfth Point. The points of criticism made in the Court below upon the conduct of the Berkshire may, as the Respondent's brief in this Court has not been seen, be here anticipated. They will not be found to have much substance.

1. It was argued upon the basis of the loose testimony of those of the Berkshire's crew who were taken into the pay of the Scotia, that after the Berkshire had made the Scotia's light about a point over her port bow, the light opened on the port bow some four points or more, under the combined influence of the Berkshire's luffing, and the Scotia's advance on her course, thus showing palpably and distinctly that the point of intersec-

tion of the two courses had been thrown astern of the Berkshire, and the danger thus avoided; but that the Berkshire nevertheless voluntarily and willfully starboarded her helm and heedlessly threw herself in the very path of danger. But there is no foundation for this imputation.

(*a.*) The testimony of the witnesses captured from the Berkshire's crew, Cunningham, Wilson, Neilson and Riley, who under the influences to which they were subjected, attempted to make out this pretended opening of the Scotia's light on the Berkshire's port bow, is so crowded with inconsistencies and grounds for suspicion, as to deserve little if any weight.

(See observations of Dr. Lushington in reference to a similar mode of procuring testimony in "The Great Eastern," Holt's Rule of the Road, 169, and see criticism on the testimony under Tenth Point.)

(*b.*) This charge is expressly denied by the libellants' witnesses, Berry, Mill and Von Wyngard, the most intelligent and trustworthy of the Berkshire's people.

(*c.*) But it is quite too incredible to deserve serious refutation, unless there were the most impressive weight of testimony in its favor, that the Berkshire would have starboarded, had the light of the Scotia opened on her port bow in any such palpable degree as to afford an assurance that the dangerous point of intersection had been passed. To suppose that the Berkshire kept under a persistent *luff*, as it is conceded she did, *for the very purpose* of throwing this point of intersection astern of her, and that by proceeding under this luff *she had really*

succeeded in her purpose, and brought the light of the Scotia so palpably further aft, as to indicate that safety had been secured, and that then, all this having been accomplished, she proceeded at once to nullify her own work, and again seek the line of danger, would be to attribute to those in command of her a degree of fatuity quite incredible.

(*d.*) When, therefore, it is seen: First, that this charge is but faintly supported by a most untrustworthy, and, in this instance, suspicious description of testimony; Second, that it is denied by witnesses much superior, both in character and capacity; and Third, that it is against every reasonable probability, it may be dismissed as wholly unfounded.

(*e.*) Whether the Berkshire at the time she starboarded had, speaking with mathematical precision, actually passed the point of intersection of the two courses, cannot be known. We have not in the evidence sufficiently certain elements to determine this; and it is not very material. The learned Judge of the Circuit Court is of the opinion that the point had been passed; but he does not regard it as very material. The best view of the case leads to the conclusion that she was not far from the very point of intersection.

The claimants' counsel in the Courts below, regarded the *point of intersection* of the lines upon which the vessels were running, in its strict mathematical signification, as possessing no *width*, so that an observer placed on the deck of the Berkshire could tell the instant when this point was reached, by the Scotia's light closing in on the bow of the Berkshire, and *instantly afterwards* visibly beginning to open.

This would be so if the observer could, with the eye alone, perceive and measure angles and

the courses and bearings of distant objects on the sea in the night time with the accuracy which a surveyor, provided with proper instruments, could attain; but all this is impossible; and the claimants themselves were, in various parts of the argument, not only compelled to claim the benefit of this impossibility, but to insist upon a large, indeed an excessive, latitude of allowance.

To the observer on the deck of the Berkshire, therefore, the line of the course of the Scotia, which it is probable at the time of the first observation crossed the bows of the Berkshire some distance ahead (inasmuch as the light did not open on the Berkshire's port bow), was not in fact a line without width, but a wide band of space upon the water. He could certainly determine that he had passed it only by a decided and sensible opening of the light on his port bow. To determine this *time* was necessary. The object was *distant*, and the angle of convergence of the two courses was very slight. The effect of these two circumstances would be, of course, to make the light apparently stationary, and the observer could determine whether its bearing changed at all only by waiting and comparing its bearing from one moment to another with his recollection of its bearing when he first observed it. If the courses of two vessels are at a large angle, say a right angle, the bearing of a distant light changes more rapidly and sensibly; but if they are approaching on lines but slightly inclined to each other, many minutes may pass and a large distance be traversed before the change of bearing is sufficiently great to become clear and palpable to the judgment of the observer.

Now, if we take the angle of inclination of the courses of the vessels in question, as their courses were stated by each, it would be just

one point; and the Berkshire might in fact have passed a considerable distance beyond the point of intersection before such passage had become palpable.

Indeed, what caused the master of the Berkshire to starboard his helm and bear away was, not that the light of the Scotia had closed in so as to be *ahead* of him, but because the luffing of the Berkshire had not had the effect of shaking the light away from his port bow. He was sailing with the wind a little abaft his beam. He could not luff much without throwing the leeches of his sails so near the wind as to cause them to shake. If he desired to luff more, it would be necessary to brace his yards sharper up, and haul the sheets of his fore and aft sails further aft. This operation would consume much time, as all hands were not on deck. He found that luffing did not accomplish the desired end, and, therefore, the plain thing to be done was to starboard and bear away, which would certainly carry him away from the course of the approaching vessel.

2. The claimants attempted further to inculpate the conduct of the Berkshire by arguing that if, as her officers testified, they supposed that the approaching light was a sailing vessel standing to the westward, close-hauled, they ought to have known that she could not have crossed his bows with the wind S. S. W. And the claimants' Counsel flatly asserted that as the Scotia was running on this occasion, she never could have closed in on the Berkshire's bow as testified to by Capt. Berry! They seemed to think that it followed, if the Berkshire was sailing South of East, a sailing vessel going in the opposite direction, in order to cross her course, must be sailing in a direction something South of West. But the ideas of our friends were in great confusion here. The two

courses S. E. by E. ½ E. and W. by N. ½ N. are not *parallel*. The two lines *must*, therefore, if extended in each direction, *intersect at some point*. Now, if you place the Berkshire on her course going easterly at *one* side of the point of intersection, and the Scotia on her course going westerly on the other side of the same point, the Berkshire *must* make the light of the Scotia over her *port bow*, and that light *must* gradually close in, provided the Scotia is a long way from the point of intersection and the Berkshire comparatively near it, which was the exact predicament in the present case. (See diagram C).

Now, it so happens, quite contrary to the notion of our friends on the other side, that a sailing vessel bound westward with the wind S. S. W., as it was on the night of the collision, could easily have sailed on *the same course* as the Scotia was running on. There are between W. by N. ½ N. and S. S. W. seven and one-half points. A square-rigged sailing vessel can sail within six points of the wind, so that in fact the sailing vessel which Captain Berry supposed the light to be on might have been sailing 1½ points nearer to the wind than the Scotia was running. As has occurred more than once in the course of the argument of our friends, so here, while they set up their pins with one hand, they knock them down with the other. They have proved that they had sail set on board of the Scotia. How, pray, could this be, if sails would not draw on that course? They certainly did not set sails to have them shake in the wind.

Thirteenth Point. Certainly there was no negligence on the part of the Berkshire, unless she was

bound, under the circumstances, by the regulations respecting lights. She made the Scotia's bright light a little on her port bow when it was from seven to ten miles distant, as soon as it could be seen. She did not see, and could not have seen the side-lights until long after. Her officers did not know what it was, but were inclined to think that it was a sail standing to the westward, close-hauled on the wind. They tried to go to windward of it, and luffed for that purpose, but could not shake the light off their bow. The master then determined, while the light was a good way off, and there was ample time to bear away, to pass it on the starboard side. He then exhibited a green light over the starboard side, and soon discovered the approaching vessel to be a steamer. He had no power to prevent the collision which followed. If, aside from the question of lights, care, skill or caution could do more, or otherwise, to prevent the accident, the further or other measure cannot be imagined by the Berkshire's counsel.

Fourteenth Point. We are thus brought to the question of lights. That we did not carry the side-lights prescribed by the Act of Congress, and by the British Admiralty Regulations, is admitted; and, for the sake of the argument, let it also be admitted that we did not, at any time prior to the collision, exhibit any *sufficient green light.* The short answer to the charge of negligence made against the Berkshire on this ground is that the Scotia cannot avail herself of a municipal statute of the United States to convict an American vessel of a *tort* on the high seas. All the questions in controversy are to be determined without reference to the municipal laws of either nation, and solely according to the general

maritime law; and by that law there was no obligation on the Berkshire to exhibit any side-lights, or not to exhibit a white light.

1. This precise question has frequently arisen in England, and has been conclusively determined by a series of decisions of the highest authority. The questions have arisen in every variety of form; in some of them the defendants, foreigners, seeking to bind the plaintiffs, British citizens, by the provisions of British statutes, and in others, British plaintiffs claiming the benefit of British statutes against foreign defendants. But the decision has been the same in all.

   Sir William Scott, in the *Carl Johann*, referred to in the *Dundee;* 1 Hagg Ad., 113.

   Nostra Signora de los Dolores (Lord Stowell), 1 Dods., 290.

   The *Zollverein* (Dr. Lushington), Swabey, 96.

   Cope *vs.* Doherty (V. Ch. Sir Wm. Page Wood), 4 K. and J., 367.

   S. C., on appeal, 2 De Gex and Jones, 626.

   The *Saxonia* (Dr. Lushington, and on appeal to P. C.,) 1 Lush., 410.

   The Chancellor, 4 *Law Times*, N. S., 627.

Fifteenth Point. The claimants' Counsel in the Courts below, conceding the general rule to be as above stated, pressed the point that inasmuch as the obligations resting on the Scotia by a British statute relating to lights were the same with those resting upon the Berkshire, the rule should be enforced in this suit on some principle of *reciprocity*. But this view cannot be maintained.

1. A Court of Admiralty on its *instance* side is *purely a municipal tribunal;* and like any other such tribunal, can only interpret the *will of the law-giver* in reference to any particular statute. The only law which this Court can administer is our municipal law, according to which torts are governed by the law of the place where they were committed. As between citizens of different nations the law of the seas is that of *nature* modified in some respects by actual usage. How can this Court say that the statute means one thing under one state of facts, and another thing under a different state of facts?

2. But the question is concluded by authority. It happened to the principal libellant (Mr. Sears), to invoke in his own behalf, in a British tribunal, on this very notion of reciprocity, in a collision cause, in which his ship was libelled by British citizens, the protection of a British statute; and he supported his claim by proof that the United States had made a like enactment. The question was most elaborately considered by Dr. Lushington, and determined against him.

   The Wild Ranger, 7 Law Times, N. S., 725 and 729; S. C., 1 Lush., 553.

3. In the face of this decision it would be a singular exhibition of *reciprocity*, to yield to the claim of the Scotia!

   See also Cope *vs.* Doherty, 4 K. & J., at p. 391.

Sixteenth Point. The learned Judge of the District Court having held upon the facts, *aside from the question of lights*, that the Scotia was in fault (7th

Blatch., 328), went further and conceded, and indeed showed in a lucid and able review of the authorities, that the ground taken by the libellants' Counsel that the Act of Congress of April 29th, 1864, was not, *proprio vigore*, binding upon either of the parties to the controversy was correct. He conceded that the merits of the collision must be determined independently of the provisions of that act, and accor ed, ing to the rules and usages of the sea. par-

Having reached this point it would seem that had determined every question which was bef him, for there was no evidence whatever that the was at the time of the collision any *practice* on t part of sailing vessels of carrying colored lights the high seas. ju- ial, be ted

But, in his view, he was required to take *judici notice* of certain facts not proved, nor even suggested, upon the trial or argument, namely, the existence of certain British Orders in Council, and of certain municipal laws of numerous maritime States. He holds, in substance, that these *have changed* the *rules and usages* of the sea; and consequently *the law* of the sea not by their own force as municipal statutes, but by their *concurrence* upon the points of side-lights and fog-signals, so that, by the *law of the sea*, as it was at the time of the collision, the Berkshire was bound to exhibit colored lights, and the failure to exhibit them was the cause of the collision.

The doctrine thus declared will not stand the test of a thorough examination.

I. Our municipal tribunals certainly cannot take *judicial notice* of foreign laws or ordinances. The learned District Judge, indeed, did not apparently suppose that he was doing precisely this. He regarded these ordinances as constituting *rules and usages of the sea*, and, therefore, matters of which he could take cognizance without proof. But "rules" and "usages" are not convertible terms.

1. A Court of Admiralty on its *instance* side is *purely a municipal tribunal;* and like any other such tribunal, can only interpret the *will of the law-giver* in reference to any particular statute. The only law which this Court can administer is our municipal law, according to which torts are governed by the law of the place where they were committed. As between citizens of different nations the law of the seas is that of *nature* modified in some respects by actual usage. How can this Court say that the statute means one thing under one state of facts, and another thing under a different state of facts?

2. But the question is concluded by authority. It happened to the principal libellant (Mr. Sears), to invoke in his own behalf, in a British tribunal, on this very notion of reciprocity, in a collision cause, in which his ship was libelled by British citizens, the protection of a British statute; and he supported his claim by proof that the United States had made a like enactment. The question was most elaborately considered by Dr. Lushington, and determined against him.

   The Wild Ranger, 7 Law Times, N. S., 725 and 729; S. C., 1 Lush., 553.

3. In the face of this decision it would be a singular exhibition of *reciprocity*, to yield to the claim of the Scotia!

   See also Cope *vs.* Doherty, 4 K. & J., at p. 391.

Sixteenth Point. The learned Judge of the District Court having held upon the facts, *aside from the question of lights*, that the Scotia was in fault (7th

Blatch., 328), went further and conceded, and indeed showed in a lucid and able review of the authorities, that the ground taken by the libellants' Counsel that the Act of Congress of April 29th, 1864, was not, *proprio vigore*, binding upon either of the parties to the controversy was correct. He conceded that the merits of the collision must be determined independently of the provisions of that act, and according to the rules and usages of the sea.

Having reached this point it would seem that he had determined every question which was before him, for there was no evidence whatever that there was at the time of the collision any *practice* on the part of sailing vessels of carrying colored lights on the high seas.

But, in his view, he was required to take *judicial notice* of certain facts not proved, nor even suggested, upon the trial or argument, namely, the existence of certain British Orders in Council, and of certain municipal laws of numerous maritime States. He holds, in substance, that these *have changed* the *rules and usages* of the sea; and consequently *the law* of the sea not by their own force as municipal statutes, but by their *concurrence* upon the points of side-lights and fog-signals, so that, by the *law of the sea*, as it was at the time of the collision, the Berkshire was bound to exhibit colored lights, and the failure to exhibit them was the cause of the collision.

The doctrine thus declared will not stand the test of a thorough examination.

I. Our municipal tribunals certainly cannot take *judicial notice* of foreign laws or ordinances. The learned District Judge, indeed, did not apparently suppose that he was doing precisely this. He regarded these ordinances as constituting *rules and usages of the sea*, and, therefore, matters of which he could take cognizance without proof. But "rules" and "usages" are not convertible terms.

A *law* or *rule* may grow out of a *usage*, but cannot be identical with it. A "*usage*" is a *fact*, and, as such, the subject of proof by the evidence of witnesses. A law is a rule prescribed by some supreme power. A *law* does not, of necessity, create a *usage*, unless indeed we are to assume that all laws are in fact invariably obeyed, even before they are known, and even in places where they have, as *laws*, no binding force.

Mostyn v. Fabrigas; 1 Smith's Leading Cases (6th Am. Ed.) 434 + notes.
Talbot v. Seaman, 1 Cr. 1; Nelson v. Bridgport, 8 Beavan 527.

1. A law or rule may prove what *ought* to be done, but cannot prove what is *in fact* done. Hence it is said that the *rule* is to be proved by consulting the statute book or the authorities; but a *usage* can be proved only by the testimony of witnesses conversant with the fact. *Statutes* cannot prove *usages*. The resort to *usage* to prove a rule, presupposes the absence of a statute; and if there is a binding *statute*, the resort to *usage* is unnecessary and irrelevant.

2. A court administering the law of the sea may indeed take judicial notice of a usage well established among mariners; but that you can prove what mariners *actually do* by reading what is written in the statute books of one or more nations is a novel proposition.

II. But let us recur to elementary principles. The fundamental rule relative to the question by what law a *tort* is to be governed, is analagous to the rule applicable to the case of contracts. As the latter are construed according to the place where they are made, so the former are judicially considered according to the place where they are committed.

Crowley v. the Panama R. R. Co. 30 Barb. 99

"*Locus regit actum.*"

Story, Conflict of Laws, § 260
Bank of Augusta v. Earle 13 Pet 585 + 591
The Antelope; 10 Wheaton 66.
Whitford v. the Panama R. R. Co. 25 N. Y. 465-
S. C. per Woodruff J. 3 Bosworth 67. 83
[illegible] v. [illegible] 4 N. Y. Trans. Co. 45 Barb 35-3.
[illegible] Court of Appeals; 35 N. Y. 352. —

1. There is an exception to this rule, in the case of a contract, not applicable to that of a tort. If a contract is made in one place, to be performed in another, the law of the place of performance governs. But, in torts, there is no element of *compact* or *agreement.* They cannot be committed with a mutual understanding between the parties that they shall be governed, as to their consequences, by the law of any particular place.

2. If the tort is committed within a municipal jurisdiction other than that of the place of trial, the rule of the foreign jurisdiction would be enforced, unless it in some manner conflicted with the law of policy of the *lex fori.*

   Parsons on Shipping and Admiralty, vol. 1, p. 530, and notes.
   The "Halley;" 2 Ad. & Eq. Cases, Law Rep., 3.
   S. C. on appeal, 2 P. C. Cases, Law Rep., 193.
   Smith *v.* Condry, 1 How., U. S. 28.

3. If the tort was committed within the territory of a *barbarous* nation, the Courts of a civilized country would not go into proof as to the law or usages prevailing there. They would not admit that there was anything in force there deserving the solemn name of *law*, and would determine the case, if they assumed jurisdiction at all, according to the rule of right reason, which is the only other code to which an appeal might be made, that is, the *jus gentium.* And as each nation assumes its own laws to approach the more nearly to the rule of right reason, each would probably apply its own law to the case, eliminating from it, however, everything of a local or peculiar character.

4. If the tort were committed in an uninhabited country, the same result would follow.

Grotius, De Jure Belli ac Pacis, lib. 2, ch. 11, § 5.

5. If the tort were committed at sea, but on the deck of a vessel, the inquiry would still be the same: What was the law of the place? And inasmuch as by a legal fiction, the vessels of each nation carry their municipal jurisdiction with them while on the high seas, the law of the place where the vessel belonged would be invoked.

6. If the tort were committed between two vessels belonging to different nations, the judicial inquiry is the same: What was the law of the place? It would be conceded at once that the municipal laws of the vessels of neither nation applied to the case; but the point to be ascertained, would be: Is there a law *of the sea* applicable to the case, and if so, what is that law?

III. We are thus easily brought to the conclusion, in which the learned Judge of the District Court entirely concurs, that this case is to be governed, not by the municipal law of either nation, but by the maritime law. The main question is, what is that law? It is conceded that, at least until a recent period, it imposed no obligation upon either of the vessels to carry colored lights, or precluded either from carrping a white light. The learned Judge below holds that it has been changed, and here we take issue with him.

1. The first answer to the position taken by him is that no change has been *proved*, nor any evidence offered tending to show such a change; indeed is is believed to have been the *practice* at the time, and to a great extent is now, for

sailing vessels *not* to exhibit colored lights when away from the shore.

2. But, next, conceding that all the municipal ordinances referred to by him were properly *proved*, they do not make any change *in the maritime law*. And this for the plain reason that the high seas are *outside* of the territory of municipal powers, and their laws have *absolutely no force* there. Nor can any force be derived from them when taken together. It is not possible, by adding together any number of zeros, to make a positive quantity.

3. It would, indeed, be a novelty in jurisprudence, to hold that when the laws of Great Britain, the United States and France, had, neither separately, nor collectively, any effect whatever on the sea, still, if the concurring statutes of substantially all other maritime States were added, the combined effect would be to change the laws of the sea. How many nations, pray, must join? Who is to determine what is a maritime State, in order to know whether all have joined? Who or what is to apprise the unlettered mariner that the municipal statutes of all nations have at last been brought into harmony?

IV. It will aid us in the inquiry as to whether the maritime law has been *changed*, to consider how and by whom it is *made*. It is not made by any sovereign or collection of sovereigns. The municipal laws of no State reach, or can reach it. It is simply a system of rules to which the nations of the earth have voluntarily agreed to submit.

1. It is made by no State, however powerful, for all the nations are absolutely equal, and none can prescribe a rule for the other.

2. It is not a body of statutes enacted by the nations collectively, for that is impossible. A congress of nations is still a chimera. When was one ever held? How could one be assembled? How could an absent one be bound? Under what pre-established forms could its proceedings be conducted? Who would preside? And more than all, what judicial power could say when its statutes were violated, and how could the penalties be enforced?

3. But still the municipal tribunals of each nation are compelled to decide controversies growing out of torts committed on the sea; and the practical problem has been wisely solved by the courts of each nation applying to it, as the *principle of decision*, the doctrines of that universal code which all men acknowledge, namely, the *dictates of right reason;* and for *positive* rules resort is had to the *actual usages* which the citizens of *all* nations who live upon the waters *have voluntarily agreed to observe.* The maritime law, therefore, consists of: First. *The rules of right reason.* Second. *The usages of the sea.*

4. The first of these two elements which constitute the code of the sea is beyond the power of man to change. The second can be changed in the same way in which it was made, viz., by the common consent of all mariners, of whatever nation, to introduce a different usage. There is no pretence of any such change in this case.

5. The mode above indicated is the method in which all law is constituted where there is no municipal law to govern. The adoption by courts of the usages of miners in the new territories of our country, is an illustration.

6. It may be asked whether two or more nations cannot, so far as they themselves are concerned, change the maritime law by treaty or convention. The answer is in the negative. The *same result* can thus be reached; but a treaty or convention does not *change* the law of the sea; it simply *substitutes* another rule, so far as the contracting powers are concerned, and thus *supersedes* the law of the sea.

V. But the municipal ordinances in question do not constitute anything in the nature of a convention or treaty. This is not, indeed, claimed by the learned Judge of the District Court, but we may not take it upon his concession.

1. There is nothing in the nature of convention or treaty upon the face of these regulations; at all events not so far as the United States are concerned, and the other powers, save Great Britain. These things are municipal statutes, and nothing more. There are in them no words or forms of agreement. Great Britain, indeed, by her Act, seems to indicate that in her view, as soon as other nations pass acts similar to her own, *she* will deem this to be an assent to a proposition made by her, and will then regard a convention as agreed upon, which her courts are to respect; and it may be very proper for her courts to act accordingly. But the United States have never done anything of the kind.

2. These acts cannot constitute a treaty for another reason. The treaty-making power cannot be exercised by the Congress of the United States, acting in its ordinary legislative capacity. A treaty can be made only by the Executive and *two-thirds* of the Senate agreeing.

3. If a treaty, who were the ambassadors? Where and how were the negotiations conducted?—Where were the ratifications exchanged?

4. If a treaty, how can it be terminated? Would a repeal of the act on our part terminate the treaty? And—still more embarrassing question—would a repeal of the act revive the prior law?

5. If we look at the matter not in the light of a treaty, but as the learned Judge of the District Court regards it, as a change in the law, produced by the concurring legislation of all maritime States, still, who can doubt the power of Congress to repeal the act they have passed, and to undo what they have done? Would such a repeal restore the old law, assuming it to be the intent of Congress to make such restoration? If we say "yes," then we should have a case in which the United States, by a *municipal enactment*, can change the law of the sea! If we say "no," then we have the anomaly that in one case, at least, Congress cannot undo by legislation what it has by legislation done.

6. On the view of the learned District Judge, that these concurring municipal enactments change the law of the sea, the question arises, at what point does this change become effectual? Is it when two, or three, or four, or what number of maritime States have concurred in the legislation? In the absence of any authoritative declaration by his own country, when is the American navigator to know that the law springs into operation?

7. And *how* is the American navigator to know that the law is changed? Great Britain enacts her law one year, the United States hers the

next. As yet, but these two powers have concurred. The Privy Council of Great Britain declare, by an Order of Council, that the new rule is in force as between the English and American vessels. Does this change the law? If so, how is the American mariner to know it? Is he bound to take notice of a British Order in Council? But it would seem to be the opinion of the learned Judge below that the concurrence of two States only would not be effective. It must have the concurrence of all, or, perhaps, the union of nearly all, would suffice. If the concurrence of all is necessary, how is the American mariner to know when it is secured? Is he bound to take notice of the several enactments of each power as they are made? If the union of nearly all is sufficient, who is to tell him when the requisite point is reached?

VI. Mr. Justice Blatchford places some stress upon the consideration that *at the present time*, in consequence of more recent Orders in Council, the rule requiring colored lights would be enforced in the British Courts in suits between British citizens on one side and American citizens on the other; and he cites instances (p. 125) showing the recent action of the British tribunals in such cases. But what of this?

1. It appears, according to the learned Judge, that by the 58th Section of the British Merchant Shipping Amendment Act of July 29th, 1862, it was provided that whenever it was made to appear to Her Majesty that the government of any foreign country was willing that the regulations for preventing collision should apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty might, by Order in Council, direct that such

regulations should apply to the ships of such country when beyond the limits of British jurisdiction. And the 61st Section of the same Act prescribes that when an Order in Council shall be issued applying such regulations to the ships of a foreign country, such ships should be treated in any British Court as if they were British ships. The British government deemed the passage of our Act of 1864 as equivalent to the expression of such willingness, and an Order in Council was accordingly issued applying the regulations to American ships.

This is to say that the British Parliament has declared and commanded to British tribunals, in express terms, that upon the making of a certain Order in Council they are to treat American ships, for certain purposes, as if they were British ships, and that the Order in Council has actually been made.

2. If our statute contained the same provision as the British Merchant Shipping Amendment Act, and something had been done in the premises by the Executive Department of our government, equivalent to the making of the Order in Council referred to, it might be argued with some force that the rule in question should be applied by American tribunals in suits between British and American ships. But as this is not so, and as we stand in precisely the same condition in which Great Britain did *prior* to the making of the Order in Council above mentioned, the decisions of her Courts *at that time* are those most entitled to notice and respect; and so, indeed, Mr. Justice Blatchford concedes; and it is due to him to say that he does not *rest his decision* upon any notion of *reciprocity*, but upon the *change* alleged by him to have been wrought in the *rules and usages*

of the sea by the concurrent regulations of various maritime States.

Seventeenth Point. Mr. Justice Woodruff in deciding the cause in the Circuit Court, rejecetd the view of Justice Blatchford, but also rejected the whole line of English authorities hereinbefore cited; and held that the failure of the Berkshire to comply with the statute concerning lights operated to prevent a recovery by the libellants. The task of the Appellant's counsel would have been simplified and abridged had the learned Judge indicated with his usual clearness the precise principle upon which he intended to base his decision. After a careful scrutiny we are still left in doubt which of the two following propositions he means to affirm.

First. That the Act of Congress of 1864, although it did not in any sense, even so far as the American courts are concerned, change, or design to change, *the law of the sea* so as to be at all binding upon British ships, did, nevertheless, lay down a rule which it was incumbent on the Berkshire to comply with; and that her neglect had the effect of depriving her of any standing in American courts; placed her, so to speak, in the attitude of coming into court with "unclean hands."

Second. That the Act of Congress declares a rule designed to promote safety upon the high seas, which is a matter of "international concern;" and that although we cannot enforce this rule beyond our own jurisdiction for want of the physical power, still "for our courts it is the rule of right reason;" and therefore so far as American courts are concerned, it is the *law of the sea*, and will be

enforced as such in any suit without regard to the citizenship of the parties.

Each of the above propositions is alike indefensible upon reason or authority.

I. As to the first proposition. It has no other support save what may be drawn from a false analogy.

1. There is indeed a sound principle of jurisprudence which denies relief to a suitor where he *bases his claim* upon some immorality or upon a breach of positive law. "*Nemo allegans suam turpitudinem est audiendus.*" The case of the footpad of Hounslow Heath, who filed a bill in Chancery against his confederate for an account of the plunder, is a familiar illustration of this principle. But it is applicable only where proof of the guilt is a necessary part of the proof of the claim. It has no application to the present case. The fact that the Berkshire did not exhibit lights is no part of the foundation of the libellants' claim. It is *pleaded by the claimants*, and is invoked solely by them as a defence.

2. The proposition under discussion gives an importance to the statutory regulation greater than is allowed to it, even in cases between our own citizens, where it is confessedly binding. The fact that a vessel injured by a collision neglected to exhibit the colored lights, does not in itself even operate to deprive such vessel of her "standing in court." She may still file her libel and recover if it appears that the failure to exhibit the lights was not the cause of the collision. In such cases the neglect is held immaterial.

The Gray Eagle; 9 Wall, 505.

3. It may be answered to this that Judge Woodruff's view is, that in this case the failure to exhibit the colored lights, and the exhibition of the white light, *was* the cause of the collision, because it *misled* the Scotia; and it is true that he did accept the pretence set up by Sowerby that he supposed the light was on a steamer. His conduct, if we accept his own statement, shows that he did not suppose she was a steamer; for when he saw the light closing in he was informed that the approaching vessel had the Scotia on the starboard hand, and according to the regulations, which he claims were binding upon him, he should, if the vessel was a steamer, have kept his course; and yet it was at this very moment that he changed it!

4. But it is to no purpose to allege that he was *misled* by the white light, unless he had just reasons for falling into this error. In other words, it must appear that he had *a right to suppose* that the white light was a steamer. He had no such right.

(*a.*) He would perhaps have had such right, had it been proved that it was *the established practice on the high seas* for no other vessels than steamers to carry a white light; but of this there is no pretence, and Judge Woodruff does not put his view on this ground.

(*b.*) He vindicates the pretended mistake of Sowerby on the ground that a steamer was alone *authorized* to carry a white light by the statute. But this is reasoning in a vicious circle. The very point in controversy is whether the statute has any application whatever. The learned Judge first *assumes*

that it *was* in operation, and binding, for the purpose of establishing the point that the Berkshire was *misled;* and then uses the misleading thus established as his warrant for applying the statute.

5. Deprived of the support of the above principle, the proposition under discussion affirms an unendurable anomaly in jurisprudence.
The Zollverein; Swabey, 96.

(*a.*) "Equality before the law" is a fundamental principle, both of legislation and jurisprudence. It is, peculiarly, our national boast, and all departures from it are everywhere apologized for and sought to be excused on grounds of some supposed necessity.

(*b.*) It will not be pretended that the reason why a foreigner is permitted to invoke in our Courts against a citizen a rule by which he is not bound, is because it is the *just right* of the foreigner.

(*c.*) Would it not be rightly stigmatized as a glaring injustice to apply to one class of our own citizens as against another, a rule by which the other was not bound? And yet upon what other ground could this be so stigmatized, except that of *inequality?*

(*d.*) Suppose the United States had absolute dominion over the seas, so that they could everywhere enforce their own navigation laws, would it not be deemed the grossest injustice to bind our own citizens to rules, and exempt foreigners from their opera-

tion? Is the *injustice* in any degree diminished because we lack the *power* to make our laws of universal application? Can anything be plainer than this, that when we cannot legislate upon principles of equality, we should not legislate at all?

II. The second proposition stated above is equally untenable.

1. It is important to fix the precise extent of the doctrine involved in it. There are some qualifying expressions in the opinion of Mr. Justice Woodruff, which carry with them the notion that he did not, even under the aspect in which his opinion is now viewed, go so far as to affirm that the American Statute had changed the law of the sea. But all that our Courts know, or can know, of jurisprudence as a practical science, apart from mere abstract and speculative questions, with which they have no concern, is what is to be actually administered by them. When, therefore, it is said in our Courts that our laws have no extra territorial operation, the meaning is that no such operation is given to them *in our Courts;* and when it is said that the laws of another nation have no force among us, the meaning is that no force will be allowed to them *in our Courts.* And if Mr. Justice Woodruff says and means that the Act of Congress of 1864 furnishes the rule of right for our Courts in all cases between whatever suitors, it follows that, in his view, that Act, so far as any practical question is concerned, *has changed the law of the sea,* and is of binding force and obligation upon all nations and all States, even at the antipodes!

2. That this is the real view intended to be taken by Mr. Justice Woodruff seems from the language of his opinion most probable. He clearly saw that the numerous maritime regulations mentioned in the opinion of Mr. Justice Blatchford could not be taken notice of without proof; that even if they were taken notice of they had no tendency to prove that the usages of the sea did, in fact, accord with them; that so far as they were the ordinances of foreign States, they could have no force in our tribunals; that there was nothing in them all combined to make out anything like a treaty or convention; and that there was no mode in which the obligation to carry colored lights could be enforced *in this suit* between citizens of different nations short of the judicial declaration that by force of the American Statute, and that alone, the law of the sea had been changed, so far as our Courts are concerned.

3. It follows as a necessary consequence of this doctrine that, immediately upon the taking effect of this act (Sept. 1, 1864), if a collision had occurred in mid-ocean between an American ship carrying colored lights, and a foreign ship not carrying them, and belonging to a country not requiring it, the foreign vessel might have been libelled in our tribunals and compelled to pay damages for this omission!

4. Let it be supposed in the case just put, what often occurs, that the only fault charged against the foreign vessel was the omission to carry the colored lights; and let it also be supposed that aside from this consideration the whole fault was with the American vessel; what would the answer be to the foreign sovereign asking the question "*by what law*

has the property of my subject been condemned?" If the answer were, "under the Act of Congress of March 29th, 1864," would he not reply with just scorn that that act had no more force against his subjects on the high seas than it had in his own dominions? He could say, with perfect justice, that the property of his subject had been condemned by no *law*, but by the *arbitrary decree* of the American Government, and that he had a just demand for reparation.

5. If it is wise and just for the American Congress to attempt to make the law of the sea for all nations upon one point, it is upon all disputed questions; and a short method is thus presented by which the perplexing differences between the jurists of different nations upon other points of the Maritime Code may be finally determined.

6. But if the Congress of the United States has the right to enact laws for the sea, and to enforce them against strangers who may seek our shores, the same right must be conceded to other nations as against us. And it would be idle to expect uniformity. There would be one rule enforced against us in Liverpool, another at Havre, another at Bremen.

"*Alia lex Romæ, alia Athenis.*"

7. A reasonable degree of uniformity is now secured; but it is secured only by a rigorous adherence of the tribunals of all nations to the fundamental principle that they are to abstain from the enforcement in respect to the high seas as between citizens of different States, of all laws save those which, as being dictated by the code of right reason, or sanc-

tioned and adopted by the actual practice of navigators, can justly be said to be in force upon the sea. Upon that boundless expanse Neptune is the only rightful sovereign; and the mightiest monarchs of the shore must yield obedience to his laws.

"*Non illi imperium pelagi sævumque tridentem.*
"*Sed* MIHI *sorte datum.*"

8. It may be asked how, upon our principles, are such changes and improvements to be made from time to time in the law of the sea, as experience may prove to be useful, or as the changing and advancing condition of navigation may require. The answer is easy.

(*a.*) One way is that in which the great body of the law of the sea has been formed, namely, by the adoption among mariners of usages which, having once become generally established, and appearing to be founded on justice and wisdom, are recognized by maritime tribunals the world over as furnishing rules which they will enforce. The Rhodian law, those of Oleron and Wisbuy, and others, derive their authority, not from the fact that they were the enactments of any single nation, but from the sanction of sovereign custom. The pride of the Roman Emperors was not humbled by submission to this authority. "I, indeed," said the Emperor Antonine, "am lord of the world; but the law is the lord of the sea. Whatever the Rhodian law prescribes in the premises, let that be adjudged."

Dig. L. 14, title 2, § 9; cited in 1 Parson's Maritime Law, 22.

(*b.*) The other way is by convention, or treaty. If it be thought by several maritime nations that upon some important point connected with navigation a general rule is necessary, and the usages of the sea are not sufficiently established and settled to furnish a rule, a convention may be agreed on covering the point. The convention does not indeed change, but supersedes, *quoad* the contracting powers, the law of the sea; and the new rule, if recognized by other nations, tends to ripen into universal custom, and to secure for itself that recognition by maritime tribunals which stamps it as the law of the sea.

(*c.*) It would be quite as easy perhaps for maritime nations to make an express convention to carry colored lights, as to enact statutes concurring on this point, but the two things differ, *toto cœlo*. The convention would alone be immediately effective for the purpose, and it is certain that none has as yet been entered into. It is, indeed, highly probable that ere long the representatives of the principal maritime states will meet and consider the propriety of establishing common conventional rules upon several points, embracing the one under discussion.

Eighteenth Point. It remains to consider whether there is anything in the language of the Act of 1864, which prevents our courts from giving effect to the universal principles of jurisprudence herein contended for, and requires them to hold that it is

imperative to construe the Act as applying to the vessels of all nations on the high seas. It is plain that there is not.

Talbot v. Seaman
1 Cranch 1
Murray v. The
Charming Betsy
2 Ad. 64.

1. In construing a municipal statute it should be presumed that Congress did not intend to override or supersede those well established principles of jurisprudence and public law upon which the jurists of all civilized States are agreed. To remove such presumption express language is requisite.

2. Such was the uniform construction of the British Statute in the British tribunals, although it contained some rather strong implications, were such a case one in which implications could be favored, that it was intended to apply to the vessels of all nations so far as English courts were concerned.

Cope *vs.* Doherty, *Supra*.
The Wild Ranger, *Supra.*
The Zollverein; 1 Swabey, 98.

3. The British Parliament in 1862 amended the Merchant Shipping Act; (see Merchant Shipping Amendment Act, 1862, 25 and 26 Vic., c. 83) and by the nature of the amendment recognized the true principles of legislation. Treating that part of the original Merchant Shipping Act of 1854, which introduced the principle of limited liability as *relating to the remedy*, it enacted in express terms that such provision should apply to *all ships*, whether British or foreign; but as to the sailing rules and the rules for carrying lights, etc., it was enacted that they should be applicable to foreign vessels *when within British jurisdiction;* that is to say, when within British waters.

4. It was indeed further enacted at the same time by the British parliament, that these provisions as

to lights, etc., should be applicable to foreign ships when *without* British jurisdiction, after the promulgation of an Order in Council to that effect, which Order in Council could be made, as to the vessels of any particular nation, whenever it should be made to appear to Her Majesty's government that the government of such foreign nation was willing that the regulations in question should apply to British ships. This is a sort of attempt to accomplish by statute the work of convention.

See sections 54 and 58 of the British Act of 1862 above referred to.

5. Our Act of 1864 contains no such legislation, and no reference whatever to any legislation by other nations, nor are foreign vessels or nations anywhere mentioned in it. On the contrary, it is by its terms expressly limited in its application to our own marine. It says, "The following rules "and regulations for preventing collisions at sea [shall] be adopted in *the navy and mercantile marine of the United States;*" and yet the learned judge of the Circuit Court holds, or seems to hold, that it must be *understood*, although not so declared, that Congress intended to make a law *for all nations, and to bind the citizens of all nations thereto!*

See Act of April 29th, 1864, 13 Stat. at Large, 58.

6. Mr. Justice Woodruff does not refer to any decision supporting his view, nor to a solitary *dictum* by any jurist of any nation. It is believed that there is none.

7. Of course, the application of the Act in question to the waters of the United States, its rivers, harbors, bays, etc., even as against foreign vessels, is not a question for discussion here; nor is its

application to the high seas in controversies between American citizens involved in this discussion. As to the authority of Congress to this extent there is no doubt.

Nineteenth Point. We have argued the question of lights as if everything turned upon it. This Court will excuse us for being elaborate in a cause of such magnitude. But in truth, upon a just view of the evidence, this collision has no concern with the question of side lights; and we should claim with confidence, if it had occurred in the harbor of New York, where the Act of Congress would undoubtedly be in force, even against foreign vessels, that the Scotia was in fault *and solely in fault.*

1. We have shown already, and in this both the learned Judges below concur, that the Berkshire starboarded *before* the Scotia discovered her light, and that therefore there was no change in the Berkshire's course *after* she came within the view of the Scotia.

2. We have also shown that the light of the Berkshire *never opened* on the port bow of the Scotia *after* the latter discovered it, until the Scotia ported.

3. It follows from this, taking into consideration the fact that the light of the Berkshire when first discovered by the Scotia was a very considerable distance away and was made only a trifle on the port-bow, that the officers of the Scotia *were as perfectly informed that the Berkshire was crossing their path* as they would have been *if she had*

exhibited the most perfect green light. A green light would not have informed the officers of the Scotia *how far off* the Berkshire was, nor *what her speed was*, nor what her *precise course* was, except that it was across the Scotia's course, and all this they were informed of by the white light and its motion.

4. As to the alleged *presumption* touching the lights: It being established that neither the Berkshire, nor Scotia *owed any duty*, each to the other, to exhibit side lights, it follows as a necessary consequence that the Berkshire was not *bound* in any manner to *presume* that the bright light she first discovered on the Scotia was on a steamer, and also that the Scotia had *no right to presume* the same thing as to the light she discovered; to hold otherwise would be to re-establish the rule just overthrown.

(*a.*) The merits of the case are not in the least degree involved in the existence of this alleged presumption, for the Berkshire did not change her course *after* the Scotia discovered her, and it is not pretended on the part of the Scotia that the latter vessel would have manœuvred differently, had she supposed the light was on a sailing vessel. The only respect in which it is alleged she was misled in acting on this presumption is, in supposing the light was further off than it really was. But as the Scotia does not pretend that she was pushed for time to take her precautions, but claims that she *did take proper precautions and in sufficient time*, and that they were defeated by a change of course on the part of the Berkshire, the question as to the right or duty to make the presumption becomes immaterial.

(*b.*) Nor does any such presumption arise from an alleged *common practice* to carry side lights on the high seas. No such common practice was proved. It was denied by the Berkshire's witnesses. Mariners have a sort of consciousness that these statutory regulations are not in force away from the shore and on the broad ocean.

5. But this notion that is put forward that the officers of the Scotia supposed the light to be on a steamer, is an afterthought. The answer contains nothing to that effect. Nor does it contain anything to the effect that the officers of the Scotia were in any respect or in any degree deceived or misled by the white light. It puts the case upon the square ground that the Scotia saw the Berkshire's light *in ample season to take the necessary precautions, and did take them*, but that their effect was frustrated by a subsequent change of course by the Berkshire.

6. Two things are clear; *first*, that even where the obligation to exhibit colored lights exists, the neglect to exhibit them is not material where it is shown that such neglect did not contribute to the collision; *second*, that such neglect, even though contributing to the collision, does not excuse a fault on the part of the other vessel, though it may lead to a division of the damages.

The Gray Eagle; 9 Wall, 505.
Chamberlain *v.* Ward; 21 How. 548, 567, 569.

Twentieth Point. Mr. Justice Woodruff lays much stress upon the conclusion to which he comes that

the Berkshire had actually passed the point of intersection before she starboarded, and was free from danger; and that this starboarding, although it may not have been a fault, inasmuch as it was out of the view of the Scotia, was nevertheless an error which contributed to the collision. But why endeavor to turn a cause of this magnitude away from its real merits.

1. It is not supposed by the learned Judge that this starboarding was not an honest exercise of the best judgment of the master of the Berkshire. It is not pretended that it was a willful throwing of himself in the way of the Scotia, and what more than this, pray, can be required of the Berkshire, before she comes within the view of the Scotia, and thus within the operation of the maritime rules?

2. But, as we have already shown, this conduct was proper and seamanlike. The law of side lights being removed from the case, the officers of the Berkshire had the right to believe, as they did in fact believe, that the approaching light was on a sailing vessel, close hauled, *out of whose way they were bound to keep.* It appeared to be crossing the Berkshire's path. They could not shake it off of her bow by luffing. Was it not the plain dictate of prudence to bear away in ample time, and get certainly clear of it while they could?

Twenty-first Point.—We have not dwelt hitherto on the *degree* of the Scotia's negligence, but have contented ourselves with showing that on the clearest rules she is responsible, and solely responsible, for

the collision. But, to state the case as it now stands, it is just this. The Berkshire was pursuing her voyage in mid ocean, and acting in perfect obedience to every rule binding upon her. From the time she discovered the Scotia's light till the collision, her conduct was cautious, prudent and skillful; and the depositions of her master and mate are referred to with pride, as statements characterized by clear intelligence, thorough seamanship, candor, and truthfulness. It has not been made necessary for the Libellants' counsel at any time to modify them, or retract from them, or to apologize for them, or to attempt to change the case first made.

The Scotia was an immense iron ship, moving through the water with terrible momentum, at the rate of fourteen miles an hour. She admits that she saw the light of the Berkshire at a distance amply sufficient to take the precautions incumbent upon steamers. It is overwhelmingly proved that this light was then *nearly ahead and moving down across the path of the steamer*. All this the first officer of the Scotia knew. A collision was imminent, unless the proper precaution was taken to prevent it. The duty of the chief officer of the Scotia was certain and imperative, first, to check the speed of this enormous ship, and reduce it to such a rate that he could easily stop, if it should become necessary, when within a very short distance of the approaching vessel. This duty he utterly neglected. Then, when he discovered the light so shutting in as to make a collision highly probable, unless a change was made, it was a fatally wrong manœuvre to port instead of starboarding the helm.

Mr. Sowerby has not even the defence that this error was the result of a want of presence of mind excusable in the case of a dangerous proximity; for, upon his own showing, the Scotia ran on her port helm some minutes until her course was changed between seven and eight points. But if it was a case

of dangerous proximity, by whose fault, pray, was it brought about?

The claimants, when this libel was filed, evidently thought that all which their defence required was to prove that the Berkshire changed her course, and did not carry any side-lights. Their recruits, picked up from the Berkshire's crew, seemed to understand that this was all that was expected of them, and endeavored not to disappoint their new friends. They accordingly pictured the Berkshire as deliberately, and with no other conceivable purpose than to bring about a collision, starboarding her helm and bearing down upon the Scotia, when the way was perfectly clear to pass without a suspicion of danger, one or more of them say *after the Scotia had got nearly a-beam* on the Berkshire's port side, as if it were possible for the Berkshire to catch her under such circumstances!

When it was found that the libellants did not deny the change of course, it was also found that these witnesses had been suffered to let out some very damaging truth, namely, that this change of course was made some ten minutes or more *before* the collision, and therefore before the Scotia discovered the light.

It then became necessary to counteract the effect of this evidence by showing, first, an opening and then a closing of the Berkshire's light on the Scotia's bow, which would indicate with great plausibility that the luffing and starboarding of the Berkshire took place *after* she was discovered. Mr. Sowerby seems to have addressed himself to this task, with what success has already been seen.

Lastly. The decree of the Circuit Court should be reversed, and the cause remanded with instructions to enter a decree for the appellants for the damages sustained by them from the collision.

JAMES C. CARTER,
Of Counsel for the Appellants.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

PAUL SEARS and others,
Libellants, Appellants,

vs.

THE STEAMER "SCOTIA," BRITISH and NORTH AMERICAN ROYAL MAIL STEAMSHIP COMPANY,
Respondents, Appellees.

Brief for Respondents, Appellees.

FACTS.

On the night of the accident, the *Berkshire* was carrying only a white globe lantern, lashed to her anchor stock, about four feet above her deck and ten feet above the water; she was provided with the regulation side lanterns, but, in order to save oil, had discontinued the use of them ten days before, when the wicks were taken from the lamps, and all cleaned and set away.

She first made the *Scotia's* light about one and a half points off her port bow; and as her course was then

diverging from the *Scotia's*, she could with perfect safety have kept on or ported, coming closer to the wind, which was west of south, if she had wished to give the approaching vessel a wider berth.

Her helm at first was put aport, by direction of her mate, and for a considerable time she was kept as close to the wind as she could lie; but afterwards, shortly before the collision, it was starboarded, by order of the captain, who gives as an excuse that he took the *Scotia* for a sailing vessel, close hauled on the port tack, and that he was heading to cross her bows.

Immediately after giving this order to starboard, the captain brought out the ship's green lantern, into which he had hastily placed a lamp usually lashed to the cabin table, and held it for a moment over the ship's starboard rail, then gave it to the mate; brought out his spy-glass, and steadied the ship. On examining the *Scotia* through his glass, he pronounced her a steamer, and at once ordered his helm hard a-starboard again, and the collision soon followed.

Under these two starboardings, the ship changed her course eight points; but except the captain's statement that when he brought out the green lantern, his ship had just swung enough under the starboard helm to bring the *Scotia's* light from her port to her starboard bow, there is no evidence as to the *Berkshire's* change of course at any specified period of time after she starboarded; nor is there any proof how much of the entire change was made under either one of the two orders to starboard, nor of how long before the collision the last order was given; and there is no proof of the distance between the vessels, at any specified period of the change, except the Master's statement that the steamer was three-quarters of a mile off ~~apart~~ when this lantern was put out.

On the part of the *Scotia* there is a full denial of having seen any but the white light on the *Berkshire*.

This light when discovered bore about one and a half points off the port bow, its bearings at first opened, but

after awhile became stationary, and then began to close in gradually. Immediately upon this the *Scotia* ported, the light, however, still continued to close in, and on this she was stopped as quickly as compatible with safety. The *Scotia* had entirely lost her headway, but the *Berkshire* being still in motion the two vessels came together; the starboard bow of the ship coming against the port bow of the steamer. The ship was just then taken a-back, and was thrown alongside of the steamer, her starboard quarter getting under the steamer's port sponson, and as the steamer's paddles were still backing, they broke in the ship's quarter so that she sunk soon afterwards.

The disaster is directly and exclusively attributable to the *Berkshire's* change of course, which was not only in the wrong direction, but constantly varying, and that she made it, was probably owing to utter neglect to notice the steamer's side lights, which were burning brightly, and were actually seen by the ship's lookout and wheelsman soon after the white light, and by the mate, and probably also by the captain, when the latter went for the lantern, at which time the improper manœuvre might have been easily countermanded.

The *Scotia's* action was proper whether the *Berkshire* had been a steamer or sailing vessel, and no imputation can be made against her, which is not perfectly excusable under the misapprehension caused by the *Berkshire's* white light, and by the confusion and perplexity created by the absence of her side lights.

POINTS.

I.—The courses of the two vessels were at first oblique, crossing at an angle of one point, the *Berkshire* being south-east by east half east, and the *Scotia's* west by north one-half north.

As the *Berkshire* first saw the *Scotia* more than a point off her port bow, she must then have passed the point of intersection.

And as she was passing the *Scotia* from left to right, her having passed this point is confirmed by the fact that the *Scotia* first made her light on the port instead of the starboard bow.

The *Berkshire's*, course after passing the point of intersection, must have diverged from the *Scotia's*, and if she had not starboarded, as it is admitted that she did, the accident would not have happened.

II.—The *Berkshire's* change of course from port to starboard was contrary to every maritime rule and usage.

She was bound to keep her course without change, if the vessel carrying the approaching light was a steamer.

And she was bound to port and not starboard if it had been a sailing vessel, because it was on her port bow, and meeting her nearly end on.

III.—The *Berkshire's* change was not only contrary to rule, but was without even plausible excuse.

It took her out of the course of her voyage, and into the direction of the only object from which danger could be foreseen.

That the captain took her, as he alleges, for a sailing vessel on the port tack, close-hauled, is not supported by any testimony, except his own statement, and is in itself almost incredible, and, if true, would neither excuse nor even explain the manœuvre.

The steamer's white light indicated a steamer and not a sailing vessel. As the wind was south of west, no sailing vessel, running west, could lay a course so far south as the *Berkshire* could, running east, so that if the light drew in, as Captain Berry obscurely intimates, it evidently could not have been a sailing vessel. With the wind in this direction he could, by luffing, have taken a course where a sailing vessel on the port tack could not have reached him; and if to lay such a course, his sails required bracing—of which there is no proof—it might easily have been done by the watch on deck. And as, when he decided to bear away, his own ship was so close that her sails were lifting, he was not required to give way, as having the wind free, but being on the starboard tack, he was bound to keep his course.

IV.—The testimony proves that the *Scotia* was stopped as quickly as consistent with safety, as soon as the *Berkshire's* light gave indication of danger.

When a large ship like the *Scotia* is running at full speed, her engines cannot be suddenly reversed without great danger to her machinery. She must be stopped gradually; and orders for this purpose were given about four minutes before the collision.

Mr. Heron, one of her engineers, says (p. 38), "when the ship is to be stopped, the first order is generally half-speed then slow, then stop, then turn back; all these orders would be executed by me, as the circumstances were that night, with the assistance I then had, in two minutes and a half."

He says, previously (p. 38), "the engine was moving backward, perhaps, a minute; perhaps not so much; not over; then the order was given to stop," the *Berkshire* being under the steamer's sponson.

Taylor, another engineer, says (p. 41), previous to the

collision, "I received orders to 'half-speed,' then 'stop,' then 'turn back,' and then 'stop' (backing). That there were but a few seconds between each order. "It was about a minute and a half after the order to back that the order to stop backing was given."

"When the ship is under full speed, and it is desired to stop her as soon as possible, the orders are generally these, 'half speed; slow; stop.'"

Mr. Sowerby says (p. 27), that the order to stop backing was not given until two minutes after the order to reverse, and was intended to prevent the steamer's paddles from striking the ship which was then alongside.

Griffiths says (p. 40), that the order to stop was four or, five minutes before the collision.

Curll says (p. 60), that it was five or six minutes before.

O'Neal says (p. 52), about five minutes before.

These measures were taken early enough to be successful in stopping the steamer's way, if not in avoiding the accident.

Sowerby says (p. 28), our headway was stopped at the time of the collision.

Chippendall, officer on the con, specially charged to observe the steamer's course, says (p. 32), our headway was stopped previous to the collision—stopped entirely.

Wilson, one of the *Berkshire's* crew, says (p. 62), I think the speed of the steamer was stopped before she struck us.

And again (p. 63), "the steamer had stopped her headway when she struck us; I saw the white water in front of her paddles."

That the headway was stopped is confirmed by the fact, that from the time when the transmission of orders to stop was commenced until the collision, the steamer could not have made an average rate of six miles per hour, for if she had, the *Berkshire*, being on her port beam, could not have overtaken her, and it is extremely improbable that

her speed could have been reduced from twelve or thirteen miles to this average if her speed had not been diminished to zero at the end of the period.

It appears also, by the evidence of Capt. Judkins and Mr. Sowerby, that the *Scotia* had not a scratch on her paint; and no damage is shown, by any witness, to have occurred to the *Berkshire* otherwise than by the steamer's paddles, which were running backwards and which struck her after she came under the front of the steamer's sponson.

The ship was thrown alongside of the steamer by her own sails, which were taken aback, and not by the steamer's motion.

V.—If the *Scotia* had not proved that she ported, or that she took any other means to avoid the *Berkshire* than this stopping of her headway, she must be exonerated, even if this measure had not been effective, unless libellants can show by a clear preponderance of evidence that the closing in of the *Berkshire's* light, the only pretended indication of her change of course, gave warning of danger so long before the orders to stop as to sustain a charge of culpable delay in giving them.

This requires proof, not merely of when the closing in was first perceptible, but how long it indicated danger before the orders were given to stop.

VI.—The only direct evidence as to how long the *Berkshire's* light began to close to the *Scotia* before her first order to the engine room is necessarily confined to those witnesses who were on board of her, because no others were in a position to make the observation.

That the *Berkshire's* light opened for some time after

collision, "I received orders to 'half-speed,' then 'stop,' then 'turn back,' and then 'stop' (backing). That there were but a few seconds between each order. "It was about a minute and a half after the order to back that the order to stop backing was given."

"When the ship is under full speed, and it is desired to stop her as soon as possible, the orders are generally these, 'half speed; slow; stop.'"

Mr. Sowerby says (p. 27), that the order to stop backing was not given until two minutes after the order to reverse, and was intended to prevent the steamer's paddles from striking the ship which was then alongside.

Griffiths says (p. 40), that the order to stop was four or, five minutes before the collision.

Curll says (p. 60), that it was five or six minutes before.

O'Neal says (p. 52), about five minutes before.

These measures were taken early enough to be successful in stopping the steamer's way, if not in avoiding the accident.

Sowerby says (p. 28), our headway was stopped at the time of the collision.

Chippendall, officer on the con, specially charged to observe the steamer's course, says (p. 32), our headway was stopped previous to the collision—stopped entirely.

Wilson, one of the *Berkshire's* crew, says (p. 62), I think the speed of the steamer was stopped before she struck us.

And again (p. 63), "the steamer had stopped her headway when she struck us; I saw the white water in front of her paddles."

That the headway was stopped is confirmed by the fact, that from the time when the transmission of orders to stop was commenced until the collision, the steamer could not have made an average rate of six miles per hour, for if she had, the *Berkshire*, being on her port beam, could not have overtaken her, and it is extremely improbable that

her speed could have been reduced from twelve or thirteen miles to this average if her speed had not been diminished to zero at the end of the period.

It appears also, by the evidence of Capt. Judkins and Mr. Sowerby, that the *Scotia* had not a scratch on her paint; and no damage is shown, by any witness, to have occurred to the *Berkshire* otherwise than by the steamer's paddles, which were running backwards and which struck her after she came under the front of the steamer's sponson.

The ship was thrown alongside of the steamer by her own sails, which were taken aback, and not by the steamer's motion.

V.—If the *Scotia* had not proved that she ported, or that she took any other means to avoid the *Berkshire* than this stopping of her headway, she must be exonerated, even if this measure had not been effective, unless libellants can show by a clear preponderance of evidence that the closing in of the *Berkshire's* light, the only pretended indication of her change of course, gave warning of danger so long before the orders to stop as to sustain a charge of culpable delay in giving them.

This requires proof, not merely of when the closing in was first perceptible, but how long it indicated danger before the orders were given to stop.

VI.—The only direct evidence as to how long the *Berkshire's* light began to close to the *Scotia* before her first order to the engine room is necessarily confined to those witnesses who were on board of her, because no others were in a position to make the observation.

That the *Berkshire's* light opened for some time after

it was seen is proved by every one on the *Scotia's* deck who was in a position to watch it. Sowerby, p. 27; Chippendall, p. 31; Nelson, p. 35; Griffiths, p. 39; Curll, p. 50; O'Neal, p. 52; Breen, p. 54.

The manœuvres of the *Scotia* after the discovery of the light are described by Mr. Sowerby, whose testimony, in this respect, is not contradicted. He says, p. 27:

> "I supposed the steamer (for which he mistook the *Berkshire*) a long way off; the light continued gradually to open on the port bow; it then stayed steady for a time, then gradually began to close in upon us. When it began to close in, I immediately ordered the helm-a-port; this order was obeyed; after that it still kept closing in upon us; I then struck the signals to the engine room for half speed, then gave the order to stop."

These orders, he says, were given in the following succession:

> "Immediately that I discovered the light stopped opening, and began to close, I gave the first order to port, about half a minute after the gong was struck for half speed; then the order to stop and hard-a-port were given as fast as they could be; an order to reverse was given immediately after the order to stop."

Unless the evidence referred to can be successfully overcome, so as to show that the opening did not occur as stated, or that there was a rapid and threatening closing in so long before the orders mentioned, as to show that there was an imprudent delay in giving them, it must be conceded that they were in time.

VII.—The libellants have not attempted to contradict, by direct testimony, this evidence of the *Scotia's* witnesses, but

they insist that the *Berkshire's* starboard must have been before the time when she is shown to have been discovered, and that her light must have been drawing in so as to give warning of danger from its discovery, and long before the time when the steamer's orders to stop are shown to have been given. But the evidence does not show that the *Berkshire* starboarded before she was seen from the *Scotia*, or that if she did, such starboarding was indicative of danger before the orders were given to stop.

VIII.—There is no direct testimony that the *Berkshire's* starboard was before she was seen from the *Scotia*, but it appears on the contrary by comparing the time between this starboarding and the collision with the time which must have elapsed after she was observed on the *Scotia*, that the starboarding could not have been until a considerable time after she was reported.

Van Wyngard one of the *Berkshire's* crew examined by libellants, says, the *Scotia's* light was seen twenty minutes before the collision.

But the best evidence as to when the first order to starboard was given must be looked for in the testimony of the ship's captain and mate, who where in charge of her course.

Capt. Berry, who was called on desk immediately after the light was reported, says p. 12 that it was fifteen or twenty minutes from the time when he came out of the cabin and made the steamer light until the collision, and that the light must at this time have been six or seven miles, off, this is probably a large estimate as the libel (p. 1), alleges that it was only four or five miles off when first seen.

Assuming the distance to have been five miles, which is the average of these two statements, and the

speed of the two vessels to have been a mile in three minutes, it is extremely improbable that there was more than fifteen minutes after the steamer's light was discovered before the collision.

Mills is the only one of libellant's witnesses who has stated when the first order to starboard was given. He says (p. 16), he gave an order to luff as soon after the light was reported as he went forward and made it out for himself; that in execution of this order the wheel was ported, and that the captain's order to starboard and bear away was ten or fifteen minutes after the wheel was ported, and (page 17), that this order was from three to five minutes after an other order to starhoard to keep the sails full, the ship being too near the wind.

Now a comparison of these estimates will show that although there was an order to starboard given from eight to ten minutes before the collision, yet the order which was intended to make the important change of course, and which alone could have caused a closing in of the light, was not given over five minutes before.

IX.—That this order could not have been given more than five minutes before the collision is confirmed by the short distance which, as will be seen, must have intervened between the two vessels at the time.

The testimony shows that the bringing out of the green lantern was very nearly coincident with the order to starboard, and this was not over four minutes before the collision, and wnen the vessels were not over three-quarters of a mile apart.

Berry says, (p. 11), that he gave the order to starboard and keep off, then went into the cabin for the ship's green lantern, to show her change of course; and (p. 12), that when he came out of the cabin with it,

his ship was just swinging off and the lights of the other vessel were just off his starboard bow.

Mills, (p. 17), being asked whether the captain went for the lantern before or after giving the order to bear away, answers:

"Much about the same time he gave orders to bear "away, and brought the steamer's light on our star- "board side and then went into the cabin for the "green lantern *showing the green light at about three- "quarters of a mile from the light we saw.*"

He says also, (p. 17), it took the captain only two or three seconds to go into the cabin and bring out the light. He says, (p. 16), that he thinks the *steamer was three-quarters of a mile off when their green lantern was shown.*

Burgess says, (p. 21), it was not two seconds after he saw the captain go into the cabin with the lantern before he went out again.

It may, therefore, be assumed that the putting out of the green lantern marks with sufficient accuracy the time when the first order to ~~bear~~ away was given, and that at this time the vessels were not over three quarters of a mile apart.

As the *Berkshire* did not relax her speed of seven knots, or a mile in about eight minutes, and as the *Scotia* must, for a part of this distance, have been going at thirteen knots, it is very improbable that more than five minutes could have elapsed after this order and before the collision; even if allowance is made for the curve in which the vessels approached and which must have some- what extended the distance passed over by each vessel be- yond her own portion of the distance then intervening between them.

X.—The only evidence assigning a longer period between this starboarding and the collision, is found in some unguarded statements of one or two of the *Berkshire's* crew; but if all their testimony is taken into consideration, it sustains the conclusions above stated.

Cunningham, one of the *Berkshire's* crew, says (p. 56,) that the *Scotia* was reported twenty-five to thirty minutes before the collision; that immediately afterwards the mate gave the order to luff, that the captain afterwards ordered the helm hard up, and the mate assisted him in doing it; and again, we kept our luff six or eight minutes before pulling our helm a starboard; we put our helm a starboard ten or twelve minutes before the collision.

The starboarding here referred to may have been the first which was to keep the sails full, but it could not have been the starboarding to bear away, because this was done with assistance, it must have been the final starboarding testified to by the ship's captain and mate.

He says, also (page 58), that the putting out of the lantern, which was at the time when the ship first bore away, was only a minute before the collision.

This testimony is too confused to be admitted as a sufficient contradiction of the ship's officers.

Riley says, (p. 60) the order to starboard was from six to ten minutes before the collision; but the larger of these estimates is not reliable as it is inconsistant with his statement that the two vessels were only a mile apart at the starboarding; and he describes the ship as making a rank sheer across the steamer's bow.

Nelson, (p. 64,) says: "The ship kept her luff about ten minutes; I then put up her helm and the steamer struck her just about that time."

This corresponds with the mate's statement as to duration of the luff, and does not contradict the other evidence as to the time under the starboarding.

Dinsmore says, (p. 71), that he came on deck while the mate was luffing and heard the captain give the order to bear away, when the ship paid off, and (p. 73,) that he was not on deck over five minutes before the vessels struck.

Anderson says, (p. 76,) that the ship had not borne away over three minutes before the steamer struck her.

An average of the estimates of the witnesses last mentioned would not put the *Berkshire's* starboarding to bear away longer than five minutes before the collision, but if it did, such estimates would not be sufficient to overcome the more intelligent estimates of the ship's two officers, confirmed, as they are, by the distances between the two vessels, both when first seen, and when the order to starboard was given, and by the necessary inferences from their respective courses and rates of speed.

XI.—The respondents have proved on their side that the *Berkshire* was seen at least twelve minutes before the collision.

Mr. Sowerby says, (p. 29,) that when he first saw the *Berkshire's* light, he supposed it to be seven or eight miles off, but he thinks it could not have been over four or five, which would make the time from twelve to fifteen minutes, or from five to ten minutes before the ship starboarded.

He says, (p. 28) that he sent an order aft for rockets immediately on the light being reported.

Nelson, extra second officer, says, (p. 36) he judged the *Berkshire's* light, when he first saw it, to be three to four miles off.

Hyndman at the wheel, says (p. 41) the order for rockets came to the wheel-house about ten minutes before they received the order, hard-a-port.

O'Neal says, (p. 52) the first order to port was given about ten minutes after the light was first reported.

Breen says the order to port was given a few minutes after the light was first reported.

Dunning says, (p. 78) that he was on the forecastle, and on reporting the light was sent aft for rockets; that he went and returned; that the *Scotia* is 400 feet long; and that he heard the two orders to port given after he had returned to the forecastle.

The testimony cited proves that the *Berkshire's* light must have been seen, at the lowest estimate, twelve minutes before the collision, or at least seven minutes before the *Berkshire* bore away, and consequently while she was keeping her luff under the port helm.

XII.—That the *Berkshire* was seen while she was luffing, and before she starboarded, is confirmed by the fact, the proof of which has already been referred to, that the *Berkshire's* light opened its bearing for some time after its discovery.

This opening would naturally be caused by the ship's luff.

It cannot be ascribed to the *Scotia's* port helm, because all the witnesses describe the porting as having been after the *Berkshire* light had stopped opening and begun to draw in.

Besides, the steamer's helm was kept a-port without change, and if the opening had been due to this cause, it would have kept on instead of stopping and closing in, as it did.

XIII.—The answer was relied upon as admitting that the steamer's only porting was immediately on discovery of the *Berkshire's* light, and it was inferred from this that

the opening of the light must have been owing to this porting of the steamer, and not to the porting of the ship.

It has been shown that this inference is contrary to the testimony and to well established facts.

But the answer does not allege or admit that the porting which it speaks of is the same referred to by the witnesses; on the contrary, the porting mentioned in the answer was *before* the opening, and when the vessels were four or five miles apart; but the only porting mentioned or referred to in the testimony was *after* the light had been observed for some time, and had stopped opening and begun to close in, this porting was in circumstances entirely different from the one mentioned in the answer. It was admitted in evidence without objection, and was legally admissible under the general allegation of the answer, that the *Scotia* took other measures besides stopping to prevent the accident. But if inadmissible it cannot be referred to as evidence that the opening of the ship's light was caused by this porting, and not by her own luff, which is the point now under consideration.

XIV.—But if it were true that the *Berkshire* starboarded before she was seen from the *Scotia*, it does not follow that the *Scotia* had any warning of danger before the time stated by respondents' witnesses, which was just before the orders were given to stop.

The *Scotia* was not bound either to stop or port on the first perceptible closing in of the light; she was justified in delaying all measures on her part until she had satisfied herself that the supposed alteration was real and not illusive, and that it was not a mere temporary change to be followed by a return to her first course.

If, therefore, the *Berkshire* light had appeared to close in immediately upon her helm being put a starboard, and

the exact time were given during which the *Scotia* kept her course without adopting any measures to avoid the collision, it would not prove or justify the inference that the orders to stop were imprudently delayed

XV.—It is demonstrable, however, that the closing in of the *Berkshire's* light could not have been apparent on the first change of her helm, but that a considerable time must have elapsed after the starboarding before any closing in would have been perceptible, a still further time before its closing could have been verified, and still further before it would give any warning requiring the *Scotia* to stop.

The *Scotia's* rapid advance would necessarily open the bearing of the *Berkshire's* light, if the latter were stationary, or running on a parallel course, or even on a converging course, unless the degree of convergence and her rate of going were sufficient to counteract the opening that would result, as before mentioned, from the *Scotia's* advance.

And even when the course and rate of the *Berkshire* was sufficient to accomplish this, she would have to make considerable progress before any closing in, much less a dangerous one, and could be perceptible.

It is clear, therefore, that the evidence of the time of starboarding, if it were really in conflict with respondent's evidence of the time when the light first began to close in, and or of the time when such closing in first took a threatening character, it is not sufficient to overcome it.

It must, therefore, be admitted that the weight of testimony is in accordance with the statements of the *Scotia's* officers and engineers, that she was stopped as soon as was requisite after the closing in of the *Berkshire's* light gave warning to do so.

XVI.—This is confirmed by an examination of the courses of the two vessels at and after the time when the green lantern was brought out.

When the ship's green lantern was brought out she was, by libellant's own testimony, not over three-quarters of a mile off from the *Scotia*, and heading almost straight for her, and this, as already shown, could not have been over five minutes before the collision, nor over from one and a half to two minutes before Mr. Sowerby gave the orders to stop.

Up to this time it is obvious there could have been no closing in of the *Berkshire's* light. If she had kept this course her light would have opened rapidly with the *Scotia's* advance.

Even if the *Berkshire* had been heading at right angles across the *Scotia's* intended course, her light, as has been shown, would not have opened from the *Scotia*, if she had been stationary, or if her rate had not been fast enough to overcome the opening which would be made by the steamer's rapid approach; and even if she were going at the course and speed requisite to close in her light, she would have to make some progress before her closing in would appear to be dangerous, or could be perceptible with certainty.

But the *Berkshire*, at this time, was heading not at right angles, but obliquely towards the *Scotia;* her entire change, up to the collision, was only eight points, and as her luff threw her course nearly two points off from the *Scotia's*, the entire change of eight points would not at the last have brought her to cross the *Scotia's* course at an angle of over six or seven points, so that there could not have been any perceptible drawing in of the light until after production of the lantern.

The curve described by this course explains and corroborates the respondents' testimony, that the closing in was at first gradual, and that the sharp closing in could not have been until considerable time after the starboarding.

XVII.—There is no evidence to show how rapidly the *Berkshire* made her change of eight points, nor even how much was made before, or how much after the helm was steadied.

Mills says, to be sure (p. 18), that the *Scotia's* light was abeam when the captain brought out the green lantern, and on the quarter when he brought out the glass; but as the *Berkshire* at first made the *Scotia's* light nearly two points on her port bow, and changed only eight points, she could never have got the *Scotia* on her quarter or even abeam. This statement must, therefore, be rejected as incredible.

She could not have been much off the starboard bow when the lantern was brought out, because she must have run much longer, probably four or five minutes at least, afterwards under her starboard helm, and must consequently have made most of her change during this period.

The only reliable testimony as to the *Berkshire's* heading at this time, is Capt. Berry's, who says, as above cited, she was just swinging under the order to starboard and had brought the *Scotia's* light just over from the port to the starboard bow.

XVIII.—If thus the *Scotia's* defense rested entirely upon having taken proper and timely measures to stop, her evidence establishes that these measures were at the first appearance of danger, and this evidence is not contradicted, but confirmed by all the testimony in the case.

But her defense does not not rest solely upon the measures to stop. She endeavored to avoid the *Berkshire* by porting on the first indication of a change on her part, and before any danger was to be anticipated from it.

In order fully to understand the propriety of this manœuvre, it is necessary to review the circumstances under which it was made.

The *Berkshire* was first discovered about one and a half points off the *Scotia's* bort bow. The vessels were thus, apparently, as well as in fact, meeting end on. As the *Berkshire's* light opened, indicating a divergence of course, the *Scotia*, very properly kept on without change. After a while the *Berkshire's* light stopped opening, and after remaining steady for a time began gradually to close in; upon this the *Scotia's* helm was ported in order to give the other vessel a wide berth. After this, the lights instead of opening, as was to be expected, still kept closing in and more sharply than before. Upon this, the usual orders were given to stop, and her helm kept a-port in order to avoid the confusion and danger that would naturally follow a change in such a moment.

It is submitted that this measure was entirely consistent with prudence and seamanship, whether the *Berkshire* is to be considered as a steamer or a sailing vessel.

XIX.—The *Berkshire* being under sail, was bound to keep her course, leaving to the *Scotia* the exclusive right to pass her under either a port or a starboard helm.

The *Scotia* was, therefore, justified in porting, and the wider the *Berkshire's* bearing off the port bow, the stronger the justification.

XX.—The testimony shows that the *Scotia*, under her port helm, would have passed the *Berkshire* on her port side if the *Berkshire* had not kept her helm a-starboard with a very slight intermission, up to the time of collision.

If the *Berkshire* had discontinued her starboard helm when the *Scotia's* light was just ahead, as it is admitted to have been about, or just before the captain brought out the green lantern, the *Scotia* would neces-

sarily have passed a safe distance ahead of her.

The excuse that he took the *Scotia* for a sailing vessel cannot apply to this stage of the occurrence, not only because the steamer's red light had previously been observed by the *Berkshire's* lookout and man at the wheel, but it was observed by her mate, and there can be little doubt that it was seen also by her captain before he went for his green lantern.

Capt. Berry pretends, on his direct examination, (p. 15), that he did not know the *Scotia* to be a steamer until after he brought out his glass, and that just as he looked through it at her light he caught sight of another light which he could not say whether it was green or not, but was not red; that he only saw it for an instant. He then says, same page:

"I saw the red light of the other vessel almost immediately after the other one shut in. Then I said to the mate 'By God it is a steamer,'" and then he gave the order, hard-up-again.

It is absolutely impossible to reconcile the truth of this statement with the positions and courses of the two vessels.

Mills, in his direct examination, (p. 15), contra dicts the captain in some of the details, but still pretends that up to the time when he examined the *Scotia* through the glass he did not know her to be a steamer.

But in his cross-examination he is asked (p. 18) whether, when the captain first put the lantern over the side, he knew the approaching light to be a steamer?

A. *Yes; we did begin to think she was a steamer, for we saw the bright light, and a red light.*

Q. *Did you see that red light before the captain went into the cabin?*

A. *Nearly about the same time.*

Q. *Do you know if the captain saw it before he went into the cabin?*

A. *I don't know, but I supposed he did, because he was standing alongside of me, and further than I can.*

Q. How long after that do you say it was before he went in for a spy-glass?

A. About four or five minutes.

Q. And at the time he went in for the glass, do you mean to say you did not know that these lights were from a steamer?

A. Not for certain, but I supposed she was, on account of her bright light and red light.

It appears, however, that instead of countermanding at this time the injudicious order to starboard, which would have allowed the *Scotia* to pass instantly across his bow, he continued running under the starboard helm, and on a course constantly changing up to the time of collision.

The only evidence that the helm was steadied after being starboarded fixes it as having been done after the glass was brought out, and ~~if, as stated by Mills, this was four or five minutes after the lantern was brought out;~~ and there is no evidence that it was kept steady long enough to be of any benefit.

The *Berkshire* must have changed her course at least six points after this time, because at first the *Scotia's* light was only one and a half points of the part bow, so that a change of two points would bring it to the position on the starboard bow, assigned to it by Captain Beny, at the production of the lantern, leaving six points of change, which have been made afterwards.

If the ship's change had been only two, or even one point less, the collision would not have happened.

The *Berkshire* course under her starboard helm, was constantly frustrating the measures adopted by the *Scotia*, and was a clear violation of the rule imposed upon sailing vessels meeting steamers, and would exonerate the *Scotia*, even if the disaster could not be thus clearly traced to it as the cause.

XXI.—The libellants charge that porting was improper as having actually contributed to the accident, alleging that if the *Scotia* had starboarded or kept on, the *Berkshire* would have crossed her bow.

There is no testimony to prove the truth of this allegation, or from which it can be inferred.

It is evident that if the *Berkshire* had steadied just before the lantern was brought out, at which time the *Scotia* must have been just ahead, and three quarters of a mile off, the *Scotia* must have passed her on the port side; but as she kept on, the curve described under her starboard helm must have been intersected by the course of the *Scotia*, if the latter had not ported, and there is no testimony to show that she would have passed this point of intersection before the *Scotia* reached it; and consequently there is no ground for supposing that the *Scotia* could have avoided the accident by keeping her course.

XXII.—Libellants insist that the *Scotia's* porting was a violation of the existing regulations of this country and Great Britain. That if the *Berkshire* was a steamer, as the *Scotia* took her to be, and six points off the *Scotia's* bow, as stated by Mr. Sowerby, she must have been crossing, and having the *Scotia* on her starboard side, the *Berkshire*, if a steamer, was entitled to manœuvre, and the *Scotia* bound to keep her course. There are several answers to this objection.

The *Berkshire* was not a steamer, but a sailing vessel, so that the supposed rule does not apply. If the *Scotia's* conduct was right on the facts as they existed, she cannot be made responsible for having misunderstood them or acted on an incorrect theory.

The old maritime rule required steam vessels always to port when in danger of collision, without regard to whether they were meeting end on or crossing. The regulation prescribing a different manœuvre for steamers crossing,

owes its origin and force to the recent statutes of this country and Great Britain, and was not binding upon the *Scotia*, unless the *Berkshire* was bound by the statutory regulations which libellants have uniformly denied. If these statutory regulations are not binding, no imputation can be made against the *Scotia* for not complying with them, and if they are binding on the *Scotia* they must also be binding on the *Berkshire*, and in such case she is clearly responsible, not only for violating the rule forbidding her change of course, but also the rule requiring her to carry colored lights, and forbidding her to carry a white light.

The libellants cannot insist that the *Berkshire* was crossing without admitting that her light opened, because at first each vessel had the other nearly end on. and they must have continued so unless the *Berkshire's* light had opened as respondents insist; if the light opened, then either the starboarding must be admitted to have been after the *Berkshire* came in sight, or else it must be admitted that the *Scotia* had no warning of any dangerous change of the *Berkshire's* course, until she gave the orders to stop, and either of these admissions must be fatal to the claim.

If, however, the light did not open as libellants allege that it did, then the two vessels were meeting end on, and under the regulations they were bound to port, and the *Berkshire* was entirely in fault for violating it.

XXIII.—Under the present statutory regulations, the *Scotia* was right in porting on the supposition that the *Berkshire* was a steamer.

When she first made the *Berkshire's* light, both vessels were meeting end on, and consequently they were not only bound, but each was entitled, to port; the rule is simple and easily understood in all cases, and especially where each vessel has the other on her port bow.

The *Berkshire* had no right to change the rule ap-

plicable to the case, by unnecessary and unreasonable change of course, especially as the rule for vessels meeting end on was in this case of certain application, and the rule for vessels crossing is in all cases uncertain and perplexing.

It cannot be denied that starboarding would have been a dangerous manœuvre, as it would have taken the *Scotia* into the way of danger, and would certainly have resulted in a collision, unless the course and distance of the supposed approaching steamer were such as to allow the *Scotia* to swing round so as to pass her astern.

After the apparently capricious change of the supposed steamer from a port to a starboard helm it would have been highly imprudent in the *Scotia* to starboard, even if the course and distance of the *Berkshire* might have enabled her to pass astern or on her starboard side, because no reliance could be placed on the constancy of her new course. For the same reason it was equally unsafe to keep on, to await without attempt to avoid the approach of a steamer that, without apparent cause, had changed from a safe to a dangerous course.

The *Scotia*, in these circumstances, properly ported her helm; by so doing she removed from the direction of danger.

She had the same right to continue, under the rule governing steamers meeting end on, that the other supposed steamer had to crowd her out of it into a different and more perplexing rule.

Her lights clearly indicated her intention to adhere to the rule, and gave notice to the other vessel to abandon her irregular course; and by keeping the helm constantly aport enabled her to do so without confusion or risk.

But in reality there was no apparent danger when the steamer ported.

Mr. Sowerby says (p. 30), that when the *Berkshire* first showed a change of course, she was apparently a mile and a half off, though in fact, as he afterwards learned, she was much nearer.

If she had really been at such a distance he might safely

calculate that, if necessary, he could swing round to a course parallel with the other vessel, so that by porting he was sure of his ability to get out of her way, and he could not be sure of this by either starboarding or keeping on without change.

XXIV.—It is evident that the accident was caused by an entire neglect, on the part of the *Berkshire*, of the indications afforded by the *Scotia's* red light, and by her improper exhibition of a light appropriated exclusively to steamers, and in placing this so low, or so near to the water, as to cause a complete deception as to her true distance.

The *Berkshire's* pretense that she toook the *Scotia* for a sailing vessel close-hauled, is removed by the well-attested fact that she had her mast-head and side-lights set, and burning brightly; these lights were actually noticed by several men on the *Berkshire's* deck.

Cunningham, who was at the *Berkshire's* wheel, says (p. 56), he saw the *Scotia's* red light just after the mate told him to keep his luff.

Riley, the *Berkshire's* look-out, says (p. 59), he saw the red light before the mate gave this order, and the mate admits, as before mentioned, having seen it at the time when the captain went for the lantern.

The *Scotia* might have avoided the *Berkshire* if she had been able to detect her change of course at once, as she might if the ship had carried her side-lights, instead of having to discover it by the uncertain and, comparatively, protracted process of comparing the bearings of her single light at one time with the recollection of its bearing at a previous time.

This misconduct of the *Berkshire* should impose upon her the consequence of the accident, even if fault existed in the *Scotia's* management, unless the libellants can show they were not barred by the regulations.

XXV.—That the *Berkshire* was bound to carry colored side lights, and forbidden to carry the white light, are submitted upon the grounds stated in the opinions of the Judges of the District and Circuit Courts.

7 Blatchford, 308.

There is, however, an additional ground which, in the present case, imposed the obligation on the *Berkshire*.

It is shown that the officers of both vessels attached the same meaning to lights. It is not necessary to ascertain whether this common understanding arose from express law or usage, or some other source. If the captain of the *Berkshire* knew, as he did, that the white and red lights indicated, or even that they might indicate a steamer, he was bound not to change his course until he had certain information that she was other than she appeared to be, and for the same reason he was bound to show his side-lights to indicate his course, and not to carry the white light, as it might misrepresent him as a steamer, and the officers of the *Scotia* would have avoided the accident if these obvious precautions had been taken.

XXVI.—The argument contained in appellant's fourth point against the opening of the *Berkshire's* light, as alleged by respondents, is put upon two grounds:

1. That it is physically impossible.

2. That it is contrary to the weight of evidence.

The supposed proposition thus denounced as impossible is definitely stated in the third point, viz., that the *Berkshire's* light, when first seen, bore from one and a half to two points off the *Scotia's* port bow, and then gradually opened until it bore from five to six points over that bow, at which time the *Berkshire* changed her course, as indicated by the light beginning to close in; that at this moment the *Scotia* put her helm a-port, and kept it so until the collision. This is alleged to be the defence set up for the respondents.

In order to show that it is impossible, the libellants' counsel has endeavored to show that the porting was not over three minutes before the collision, when the two vessels must have been in very close proximity, but he does not state what bearing this fact has on the point under discussion.

He then announces as a familiar geometric principle, that if the *Berkshire's* light at any time opened five or six points from the *Scotia*, there must have been an equal opening of the *Scotia's* light from the *Berkshire*. That as there was no such opening of the *Scotia's*, there could not have been such an opening of the *Berkshire's* light.

That if the *Scotia* had ever got the *Berkshire* so far a-beam as five or six points, the latter's change of course could not have been sufficient to bring her bow against the *Scotia*, as actually happened.

And lastly, that if the *Berkshire* had ever got so far off the *Scotia's* beam, she never could have intercepted her and the collision could not have happened.

On these propositions he concludes the utter impossibility of the opening alleged by respondents, and found to be true by his Honor the Circuit Judge.

The only testimony cited in support of the allegation that this opening is contrary to the weight of evidence, all shows that the opening actually took place, as is shown by the testimony referred to above in Point IV.

It is clear, therefore, that this opening is supported by a large preponderance of testimony, and if the fact is physically impossible, as contended by respondents' counsel, it can not be said to be against the weight of evidence, but the evidence must be considered as false.

Before considering the libellants' argument to show that the opening was impossible, it is proper to remark that respondents do not depend exclusively upon the estimate of any single witness as to the degree of opening; these estimates vary with each witness, according to their capacity of judging, place of observation and other opportunities of making it with accuracy. The respondents insist that there was an opening before the order to port, although it may not have been so great as five or six points, as it was thought by Mr. Sowerby, or so small as three points, as it was thought by Mr. Nelson.

The opening stated is entirely consistent with the movements of the two vessels before a change had been made by either.

As soon as the *Berkshire* had passed the point of intersection of the two courses, her light would necessarily open from the *Scotia* under the combined effects of the divergence of the courses and the rapid advance of the two vessels. So that if the *Scotia's* people had seen the *Berkshire* at this time, they must have seen such an opening as they have sworn to.

Is, then, this opening, which is so perfectly consistent with the acknowledged movements of the two vessels, physically impossible?

It is not mathematically true, as libellants' counsel supposes, that the change of bearing of one vessel required a corresponding change in the bearing of the other. If the *Berkshire* had changed her head without any progressive movement, the *Scotia's* bearing would alter, but her own bearing from the *Scotia* would depend entirely upon the rapidity of the *Scotia's* advance, and even if such change was made while under way, her bearing from the *Scotia* would depend not upon her own change of motion; but upon the united

effects of this change together with her own movement in that direction and the *Scotia's* movement on an opposite direction.

And when she had acquired a course converging towards the *Scotia's* she might easily strike her with the bow, even although she started from off the *Scotia's* beam.

The supposed opening of the *Berkshire's* light cannot, therefore, be considered impossible on either of the two grounds first stated by libellant's counsel.

The counsel evidently places most, and apparently implicit reliance upon his only remaining ground, which is that if the light had opened five or six, and even two points, the *Berkshire's* speed was not sufficient to allow of her overtaking the *Scotia* and the collision could not have happened.

This objection will be found, on examination, to result in a very different conclusion from that stated by libellant's counsel. If, as he supposes, the steamer, from the time of parting till the collision, was running twice as fast as the ship, it is clear that the ship could not have caught up with her from *any* position off her port bow. In order to render a collision possible under these conditions of speed, the ship must necessarily be placed half-way nearer than the steamer to the point of collision; this would put the ship wide off the steamer's starboard bow, which is contrary not only to all the evidence, but to the admitted fact that she was, during the whole time, on the steamer's port bow.

It is impossible to account for the collision when the ship was on the steamer's port bow at the change of course, without admitting that she was going much faster than the steamer; otherwise the steamer would have passed the place of collision before the ship could have reached it. Now if the ship's speed had been reduced to six knots, under the fancied disadvantage of running before the wind, it is obvious that the steamer could not have made an average rate of as much as six knots from the time of her parting until the collision,

and as her speed was diminished in an increasing ratio, it is demonstrable that it could not have been reduced from twelve knots, as it was at first, to an average of six, without she was at a dead stop at the end of the supposed distance.

It is submitted, therefore, that the opening stated by the witnesses is not impossible, but in entire accordance with all the other facts established in the case.

XXVII.—The conclusions drawn in libellant's fifth point from his supposed proof that there was no opening of the *Berkshire's* light as sworn to by the respondent's witnesses; they are therefore not to be admitted.

But let us assume them to be legitimate conclusions in order to see how far they support his case.

These conclusions are:

Either, that the *Scotia*, after making the *Berkshire's* light so near ahead as to threaten a collision and kept on her course without change until the last moment, and then ported when she ought to have starboarded, or assumed that she never saw the *Berkshire's* light at all until it was dangerously near, and then wrongfully ported.

If we are to assume the time which elapsed between the discovery of the *Berkshire's* light and the porting of the *Scotia* to be as stated by libellant's counsel, no alternative would exist. The *Scotia* must then be assumed to have ported the instant the *Berkshire's* light was discovered; on such a state of facts, no blame can be imputed to the steamer, because it appears by testimony cited in respondent's IV point, and part of it cited also in libellant's IV point, that the orders to the engine were given instantly after the order to port, so that the *Scotia* not only ported, but stopped as soon as she disovered the *Berkshire*. Certainly nothing more could be required of her unless it were to have seen the *Berkshire* earlier. But there is no testi-

mony that a good lookout was not kept. On the contrary, every precaution was used; and if she was not seen until such a late period as supposed, the fault must be ascribed to the *Berkshire's* imperfect light, and not to want of vigilance on the part of the steamer. If the *Scotia*, when so near a collision, had made a false move, the fault was not her's, but the *Berkshire's*, for getting her into the embarrassment.

But it was not improper for the *Scotia* to port if the *Berkshire* was so nearly ahead; if so the two vessels were heading end on, and the rule established by long usage and express enactment, both here and in Great Britain, requires steamers to port in these cases, and the *Berkshire* was then believed to be a steamer, of which she had all the indications.

The apparent distance of the *Berkshire* owing to the size and low position of her lights, would have justified the *Scotia* in porting, even on the assumption that she was under sail.

But to restore to the propositions of libellant's counsel their assumed character of a dilemma, we must suppose that it was much longer than he states between the discovery of the *Berkshire* and the *Scotia's* porting.

But this will be found to contradict his position that the *Berkshire* could not have been seen while her light was opening; he assumed that the porting, which he puts at not over three minutes before the collision, was instantly upon the discovery of the light; now the *Scotia* cannot be charged with fault in delaying her measures to counteract, the *Berkshire's* change of course, without admitting such an interval between the discovery and the porting as necessarily assigns to the discovery a time anterior to the starboarding; it proves, consequently, that the light must have been seen to open, and so long as the light opened, the *Scotia* was justified in holding her course.

XXVIII.—The reasons stated in libellant's VIth point in

proof that the *Berkshire* starboarded before she was seen from the *Scotia*, are his supposed demonstration that there was no opening of the *Berkshire's* light, which opening, as he alleged, would necessarily follow the discovery of the *Berkshire's* light while keeping her track, and an assumption that the testimony shows that the *Berkshire* was discovered not over five minutes, while her starboarding was from ten to fifteen minutes before the collision.

It has been already shown that the supposed refutation of the proof of opening of the *Berkshire's* light is a mistake: that both the testimony and admitted facts show that the *Berkshire's* light did open, as contended by respondents, and if we may therefore conclude, on libellant's admission, that as the opening was seen, the *Berkshire* must have been seen while keeping her luff.

It seems, at first, unaccountably strange that the *only* testimony cited to prove such an important fact as the time when the *Berkshire* starboarded, should be three of the *Berkshire's* crew who were examined by respondents, to whom the counsel had applied various derogatory epithets (pp. 35, 69), instead of the master and mate of the *Berkshire*, to whose depositions he refers with enthusiasm and even exultation. (P. 68).

But an examination of the evidence of these officers explains the mystery, for, as shown above in Point VIII, their testimony brings the *Berkshire's* starboarding down to within five minutes of the collision, which was long after the light was reported. This testimony cited by libellants, as shown above in Point X., is not contradicted in any essential particular by the evidence of the time of starboarding given by the *Berkshire's* officers and other evidence to the same effect, cited in this point which libellants have not referred to, and which confirms that of the master and mate.

It is clearly impossible that the ship, with a nine knot breeze, or even less, could have starboarded and borne away as much as fifteen or even ten minutes before the collision, as libellants contend. From her first bearing away, her helm was kept a-starboard

until the collision, with the exception of a short time after the captain brought out his glass, when it was steadied. During all this time she must have been swinging round before the wind; and if her speed was only six knots—which is making a large allowance for the supposed bad trim of her sails—she must, in the time supposed, have gone from a mile to a mile and a half. Now, her mate states, repeatedly, that when the lantern was brought out, which was immediately after she bore away, the *Scotia* was not over three-quarters of a mile off. Now, both vessels were at that time approaching each other; and if they had kept on without change, neither could have gone so far as three-quarters of a mile before uniting; the *Berkshire*, being the slowest, would not make half this distance; and, even allowing for the increase of distance caused by the change of helm, both on her part and the *Scotia's*, it seems impossible to suppose that she went under the starboard helm as much as three-quarters of a mile before bringing up against the steamer. It is clearly impossible, therefore, that she was swinging ten, much less fifteen, minutes under the starboard helm without making more than eight points of change.

D. D. Lord,
E. C. Benedict,
For Appellants.

Wednesday 1 [illegible]

1 Branch —
Ordinal amendment
1842 —
Loss
Exchange & Specie
Specie —

Light Spend

murder h 27 — h 31 — disappeared —
h 35 — h 39 — h 50 4th Inst
hand witnessed —
h 51 — h 52 — bottom — h 54 —

NS after footing —

Those was on Spencer
Then any Mrs Goodwin —

h 17 mate 3/4 this mile

h 21 —
Spanish 50 — 100 twelve months
7 Black 308